Supreme Court, U. S.
FILED
JUN 12 1974
CLERK

APPENDIX

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 73-1496

DANIEL CHAPMAN and NICOLE STOCKMAN,
Appellants,

v.

BEN HOEH, Secretary of State for the
State of North Dakota,
Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA

CONSOLIDATED INDEX

Page

Single Appendix Index

List of Relevant Docket Entries 1

Amended Complaint 4

Answer to Amended Complaint 8

Judgment of January 30, 1974, by Judge Benson and Judge Van Sickle 11

Appendix "B" to Memorandum Opinion and Order of June 30, 1972, by Judge Bright and Judge Van Sickle ("Ostenson Plan") 12

(Note: Appendix "A" to Memorandum Opinion and Order of June 30, 1972, is the "Dobson Plan" and is the same as Appendix "A" to the Memorandum Opinion and Order by Judge Benson and Judge Van Sickle of January 30, 1974, reproduced at page A-16 of the Appendix to the Jurisdictional Statement.)

Original Section 26, Constitution of North Dakota 23

Amendment to Section 26 of the Constitution of North Dakota Adopted June 28, 1960 23

Original Section 29, Constitution of North Dakota 23

Amendment to Section 29 of the Constitution of North Dakota Adopted June 28, 1960 23

Original Section 35, Constitution of North Dakota 24

Amendment to Section 35 of the Constitution of North Dakota Enacted as of June 28, 1960 24

Index to Jurisdictional Statement Appendix

Notice of Entry of Judgment Dated January 30, 1974 .. A-1

Memorandum Opinion and Order by Judge Benson and Judge Van Sickle, January 30, 1974 ..... A-2

Appendix "A" to Memorandum Opinion and Order of January 30, 1974 ..... A-16

Dissenting Opinion by Judge Bright of January 30, 1974 .. A-22

Order of May 22, 1972 ..... A-54

Memorandum Opinion and Order of June 30, 1972, by Judge Bright and Judge Van Sickle A-57

Dissent by Judge Benson to Memorandum Opinion and Order of June 30, 1972 ..... A-66

Notice of Appeal to the United States Supreme Court ... A-68

Map of Legislative Districts for North Dakota Legislative Assembly Established Pursuant to Judgment of January 30, 1974 ("Dobson Plan") A-70

Index to Motion to Affirm Appendix

Order of May 22, 1972 ..... A-1

Report of Special Master, Richard Dobson A-3

"Dobson Plan" A-7

Certificate by Ben Meier Dated October 25, 1973 ..... A-8

Proposed North Dakota Constitutional Amendment A-9

Referred North Dakota Reapportionment Statute A-11

Certificate by Ben Meier as to Results of Special Election of December 4, 1973 ..... A-22

Certificate of Grand Forks County Auditor of December 18, 1973 ..... A-23

Certificate of Ward County Auditor of December 18, 1973 ..... A-24

LIST OF RELEVANT DOCKET ENTRIES

Date	Filings—Proceedings
1971	
Nov. 15	Complaint, Filed
Dec. 1	Answer, Filed
1972	
May 8	Amended Complaint, Filed Pursuant to Direction of the Court
May 10	Answer to Amended Complaint, Filed
May 15	Designation of Three-Judge Court by M. C. Matthes, Chief Judge of the Eighth Circuit, Designating the Honorable Paul Benson, Honorable Bruce M. Van Sickle, and Honorable Myron H. Bright as Members of the Three-Judge Court, Filed
May 22	Order, Filed (printed at pages A-54 through A-56 of Jurisdictional Statement)
June 30	Memorandum Opinion and Order Signed by Circuit Judge Myron H. Bright and District Judge Bruce M. Van Sickle, Filed (printed at pages A-57 through A-65 of Jurisdictional Statement)
	Dissenting Opinion by Chief Judge Paul Benson (printed at pages A-66 through A-67 of Jurisdictional Statement)
	Appendix "A" (Dobson Plan) and Appendix "B" (Ostenson Plan) to Memorandum Opinion and Order

Oct. 30 Motion by Defendant to Stay Further Proceedings Until Conclusion of 43rd Session of North Dakota Legislative Assembly

Nov. 8 Order Staying Further Proceedings

1973

Mar. 30 Return to and Compliance with Order of Court of November 8, 1972, Submitted by Defendant

Motion to Dismiss by Defendant

Apr. 3 Return to Motion to Dismiss by Plaintiffs, Together with Motion to Stay All Proceedings by Plaintiff

May 25 Order of Three-Judge Court Staying All Proceedings

Dec. 26 Motion by Defendant to Re-Adopt Court-Fashioned Plan, Together with Certificates of Ben Meier, Secretary of State Relating to December 4, 1973 Election, Certificate of Auditor of Ward County, and Certificate of Auditor of Grand Forks County

Dec. 28 Return to Motion by Plaintiffs, Together with Motion by Plaintiffs for Order Directing the Adoption of a Permanent Apportionment Plan for the North Dakota Legislature in Accordance with the Memorandum Opinion by the Court Dated June 29, 1972

1974

Jan. 14 All of the Following Documents Filed on Behalf of Secretary of State for the State of North Dakota:

1. Minutes of Committee on Reapportionment Dated September 18, 1972, October 11 and 12, 1972, November 8 and 9, 1972, and November 28 and 29, 1972.

2. Report of Special Committee on Reapportionment. Together with Legislative Council Reapportionment Plan Adopted by the Committee on Reapportionment (pages 135-138).

3. Memorandum on the Legal Aspects of Redistricting, Together with a Map Showing the Population per Census Enumeration Districts and a Computation of Number of State Senators per Population per District.

4. One Copy of the Governor's Message to the 43rd Legislative Assembly and a copy of page 4 of said Message which pertains to Reapportionment.

Jan. 30 Memorandum Opinion and Order by District Judges Paul Benson and Bruce M. Van Sickle that the Dobson Plan as Appendix "A" is Adopted as the Permanent Plan for Reapportionment for the State of North Dakota, Together with Dissenting Opinion by Judge Myron H. Bright (the Opinion by Judge Benson and Judge Van Sickle, together with the Dissent by Judge Bright are printed at pages A-2 through A-53 of Jurisdictional Statement)
Judgment Entered and Filed

Feb. 27 Notice of Appeal to the United States Supreme Court by Plaintiff from the Final Judgment and Order Entered on January 20, 1974 (Notice of Appeal printed at pages A-68 through A-69 of Jurisdictional Statement)

Mar. 4 Admission of Service of Notice of Appeal on Behalf of Appellee

Mar. 28 Copies of Following Apportionment Plans Filed by Chief Judge Paul Benson:

1. Moore Plan, No. 1 and No. 2.
2. Moore Plan, No. 3.
3. Addendum to the "Smith Plan" of Legislative Redistricting.
4. Ostenson Plan.
5. Air Base Legislative Redistricting.
6. Dobson Plan.

May 6 Certified Copy of Order of Supreme Court of the United States Noting Probable Jurisdiction.

UNITED STATES DISTRICT COURT
DISTRICT OF NORTH DAKOTA
SOUTHEASTERN DIVISION

DANIEL CHAPMAN and JACQUE STOCKMAN,
Plaintiffs,
vs.
BEN MEIER, Secretary of State for the State of North Dakota,
Defendant.
Civil No. 4664

AMENDED COMPLAINT

(Filed May 8, 1972)

The plaintiffs, for their complaint, allege:

I

Federal jurisdiction is based upon the Fourteenth Amendment of the Constitution of the United States of America, and upon

28 United States Code, Sections 1331, 1343 and 2281. It is further alleged that the amount in controversy herein exceeds the sum of $10,000.00 exclusive of interest and costs.

II

The plaintiff, Daniel Chapman, is a citizen of North Dakota and a resident of Bismarck, North Dakota. The plaintiff, Daniel Chapman, is a qualified elector and exercises his franchise within the Thirty-second Legislative District as established by the United States District Court for the District of North Dakota. The plaintiff, Jacque Stockman, is a citizen of North Dakota and a resident of Fargo, North Dakota. The plaintiff, Jacque Stockman, is a qualified elector and exercises his franchise within the Twenty-first Legislative District as established by the United States District Court for the District of North Dakota.

III

The defendant, Ben Meier, is the duly elected and acting Secretary of State for the State of North Dakota. As such, the defendant is responsible for administering the election laws of the State of North Dakota including the certification of candidates for election to the North Dakota State Legislative Assembly, all as set out under Chapter 16-05 of the North Dakota Century Code and other pertinent statutes and laws of the State of North Dakota.

IV

On August 10, 1965, United States District Court for the District of North Dakota, issued its order establishing an apportionment plan for the North Dakota Legislative Assembly meeting the requirements of the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States

of America. In accordance with applicable decisions of the Supreme Court of the United States, this plan was based upon the 1960 Federal decennial census for North Dakota.

V

Subsequent to the 1970 Federal decennial census for North Dakota, the Forty-second Legislative Assembly of the State of North Dakota failed, neglected and refused to adopt an apportionment plan for the North Dakota Legislature meeting the requirements of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. The North Dakota Legislative Assembly has adjourned and is not scheduled to reconvene until 1973, after the next general election at which members of the Legislative Assembly will be elected. The North Dakota Legislative Assembly, in so failing to perform its mandatory obligation to enact an apportionment plan, has denied plaintiffs and each citizen of the State of North Dakota the equal protection of law guaranteed under the Fourteenth Amendment of the United States Constitution.

VI

As reflected by the 1970 Federal decennial census for North Dakota, there have been substantial shifts in population within the State of North Dakota in the years between 1960 and 1970. As a result, the apportionment plan adopted by the United States District Court under its order of August 10, 1965, no longer provides representation in the North Dakota Legislature on a basis complying with the requirements of the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution.

VII

Unless enjoined by this Court, the defendant, Ben Meier, in performing his statutory duties as the Secretary of State for the State of North Dakota, will administer the laws relating to elec-

tion of members of the North Dakota Legislature during 1972 in accordance with the constitutionally invalid 1965 apportionment plan. The rights of the plaintiffs and each citizen of North Dakota guaranteed by the Fourteenth Amendment to the United States Constitution will thereby be irreparably abridged and denied.

VIII

Plaintiffs request this Court to establish by its order, an apportionment plan for the North Dakota Legislature based upon the 1970 Federal decennial census, meeting the requirements of the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution and also providing for single member districts in accordance with the decision of the United States Supreme Court in the case of *Connor v. Johnson* (1971), — U.S. —, 29 Law Ed.2d 268, 91 Sup.Ct., P. —.

IX

Pursuant to 28 U.S.C. 2281, plaintiffs respectfully request that a three member Court be convened to hear and determine this cause. Alternatively, plaintiffs request that this cause be heard by a single member Court.

Wherefore, plaintiffs pray for judgment as follows:

(a) That the Court determine and declare that the 1965 apportionment plan for the North Dakota State Legislature, issued by the United States District Court for the District of North Dakota, is no longer valid under the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution.

(b) That the defendant, Ben Meier, be permanently restrained and enjoined from administering the laws pertaining to the election of members of the North Dakota Legislature under the existing 1965 apportionment plan.

(c) That this Court issue its order establishing a constitutionally valid apportionment plan for the North Dakota Legislature, based upon the 1970 Federal decennial census for North Dakota, said plan to provide for single member districts and requiring the defendant to comply with said plan in administering the election laws of the State of North Dakota.

Dated this 8th day of May, 1972.

/s/ JOHN D. KELLY
609½ First Avenue North
Fargo, North Dakota 58102
Attorney for Plaintiffs

UNITED STATES DISTRICT COURT
DISTRICT OF NORTH DAKOTA
SOUTHEASTERN DIVISION

ANSWER TO AMENDED COMPLAINT

(Filed May 10, 1972)

(Number and Title Omitted)

The Defendant for his Answer to the Amended Complaint denies each allegation set forth in the Complaint except as otherwise admitted, qualified or modified herein.

I

The Fourteenth Amendment of the United States Constitution in itself does not confer jurisdiction. It is admitted that 28 U.S.C. Sections 1331, 1343 and 2281 confer jurisdiction upon

the Court, if the pleadings set forth the proper requisites. It is not admitted that the pleadings in this instance set forth the proper requisites.

II

Paragraph II of the Complaint is admitted.

III

Paragraph III of the Complaint is admitted except that portion sating that the Secretary of State is responsible for administering the election laws of this State is in part denied but as to his duties and functions set forth in Chapter 16-05 of the North Dakota Century Code the same are admitted.

IV

Paragraph IV of the Complaint is admitted.

V

Only that portion of Paragraph V stating that the Forty-second Legislative Assembly failed and neglected to adopt a valid reapportionment plan, and that the Legislature has adjourned and is not scheduled to meet again until 1973 after the next general election of 1972 is admitted.

VI

Only that portion of Paragraph VI stating that some shifts in population within the State of North Dakota have occurred between the years of 1960 and 1970 is admitted.

VII

Only that portion of Paragraph VII of the Complaint stating that the Secretary of State will perform his administrative duties according to the laws relating to the election of members to the Legislature is admitted.

VIII

Paragraph VIII of the Complaint is a request and a prayer to the Court and same is resisted.

IX

The Complaint fails to allege facts upon which relief can be granted and is lacking in other pertinent jurisdictional material making the same jurisdictionally void and defective as to the relief requested.

Wherefore, the defendant prays that the action be in all things dismissed and that all of the relief requested for by the plaintiffs be denied.

Dated this 9th day of May, 1972.

HELGI JOHANNESON
Attorney General

/s/ PAUL M. SAND
First Assistant Attorney General

Attorneys for Defendant, Ben Meier, Secretary of State

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA
SOUTHEASTERN DIVISION

DANIEL CHAPMAN and JACQUE STOCKMAN,
Plaintiffs,
v.
BEN MEIER, Secretary of State for the State of North Dakota,
Defendant.

Civil No. 4664

Before BRIGHT, Circuit Judge; BENSON, Chief District Judge; and VAN SICKLE, District Judge.

JUDGMENT

(Entered and Filed January 30, 1974)

Pursuant to the order for judgment entered in the above entitled matter on the 30th day of January, 1974,

It Is Adjudged and Decreed that the reapportionment plan attached to the said order for judgment as Exhibit A, is adopted as the permanent plan for reapportionment of the state legislative districts of the State of North Dakota.

Dated this 30th day of January, 1974.

s PAUL BENSON
Chief Judge
United States District Court

s BRUCE M. VAN SICKLE
Judge
United States District Court

Appendix B

To Memorandum Opinion and Order

A legislative redistricting plan for North Dakota is submitted herewith for the Court's consideration. Some of the important features of this redistricting plan and the criteria used are as follows:

(1) The natural boundary imposed by the Missouri River should be recognized and any proposed legislative district should not cross the river.

(2) The magnitude of the deviation of a district population, above or below the state average, should be kept at a minimum.

(3) Legislative district boundaries should coincide with political subdivision boundaries to facilitate the work of election officials at election time.

(4) District compactness and avoiding elongated districts should be considered.

When criteria one and two above were studied, it became apparent that the number of solutions that could be suggested would be limited. According to the United States Census, there were 86,184 people west and south of the Missouri River in 1970 and 531,577 people east and north of the Missouri River. The total state population was 617,761. Accordingly, the number of legislators in a plan that most nearly equalizes legislative representation statewide is 43 senators and 86 representatives.

Additional solutions are 50 senators and 100 representatives; or 36 senators and 72 representatives. These three solutions would make it possible to keep the average number of people per senator on both sides of the river at a uniform level.

No. of Senators	50[a]	43[b]	36[c]
Average (West)	12,312	14,364	17,236
Average (East)	12,362	14,367	17,147
Statewide Average	12,355	14,366.5	17,160

[a] Seven senators west of the Missouri River and forty-three senators east of the river.

[b] Six senators west of the Missouri River and thirty-seven senators east of the river.

[c] Five senators west of the Missouri River and thirty-one senators east of the river.

A review of the map and plan providing for 43 senators and 86 representatives shows that districts 3, 14, and 15 are elongated. This is in the more sparsely settled area of the state and more compactness, although desirable, could be attained only by disecting more counties and making the boundaries more irregular. However, there are main highway arteries east and west within each district and good hard-surfaced roads leading to them. Accordingly, the elongated districts were chosen as the least objectionable of the alternatives.

In this plan all district boundaries, except in the case of District 27 (Fargo), follow township lines so as to facilitate the work of election administration officials. District 27 includes the north half of rural Barnes township. However, this township is already divided into two precincts and it would merely be necessary to define new precinct boundaries.

Although this plan does not show a break up of "multisenator" districts, the population data recently available make it possible to do so should the Court so desire.

The Court's attention is directed to the district deviations from the state average of 14,367 people per senator. The deviations range from 375 below to 480 above the state average. The per-

cent deviation is − 2.61 percent to + 3.34 percent for a total variance of 5.95 percent.

If this suggested redistricting plan is adopted by the Court, it seems best in fairness to all concerned that the office of all incumbent senators be declared open for nomination and election in 1972 in the usual manner.

A description by townships for each suggested legislative district is submitted herewith.

POPULATION PER SINGLE SENATOR DISTRICT

Number of State Senators	Population Per District
50	12,355
49	12,607
48	12,870
47	13,144
46	13,430
45	13,728
44	14,040
43	14,367
42	14,709
41	15,067
40	15,444
39	15,840
38	16,257
37	16,696
36	17,160
35	17,650
34	18,169
33	18,720
32	19,305
31	19,928
30	20,592
29	21,302

The official resident population count of North Dakota as of April 1, 1970, was 617,761. (Bureau of the Census Report PC(1)A36, April, 1971, which represents the final count of resident population.) Prepared by Agricultural Economics Department, North Dakota Agricultural Experiment Station, North Dakota State University, Fargo, North Dakota, May, 1972.

Ostenson

SUGGESTED LEGISLATIVE DISTRICTS

(Legislative districts based upon population count as provided by the Bureau of the Census for 1970).

No.	Description of Area	Members Senate	Members House
1.	Township 152 north of ranges 100, 103, and 104 west; townships 153, 154, and 155 north of ranges 100, 101, 102, 103, and 104 west; townships 156, 157, 158, and 159 north of ranges 101, 102, 103, and 104 west lying within the county of *Williams*	1	2
2.	All of the county of *Williams* except the townships thereof which comprise District No. 1; county of *Mountrail;* townships 156, 157, and 158 north of range 87 west, lying within the county of *Ward*	1	2
3.	County of *Divide*; county of *Burke;* township 160 north of ranges 84, 85, and 86; townships 161, 162, 163, and 164 north of ranges 84, 85, 86, and 87 west lying within the county of *Renville;* townships 159 and 160 north of ranges 87, 88, and 89 west; township 161 north of range 88 west lying within the county of *Ward*	1	2

No.	Description of Area	Members Senate	House
4.	All of the county of *Ward* except the townships thereof which comprise a part of districts No. 2 and No. 3	4	8
5.	County of *Bottineau;* all of the county of *Renville* except the townships thereof which comprise a part of District No. 3; township 155 north of ranges 79 and 80 west; townships 156, 157, and 158 north of ranges 75, 76, 77, 78, 79, and 80 west; township 159 north of ranges 76, 77, 78, 79, and 80 west lying within the county of *McHenry*	1	2
6.	All of the county of *McHenry* except the townships thereof which comprise a part of District No. 5; township 150 north of ranges 72 and 73 west lying within the county of *Wells;* townships 151, 152, 153, 154, and 155 north of ranges 72, 73, and 74 west lying within the county of *Pierce;* townships 151, 152, 153, 154, 155, and 156 north of ranges 68, 69, 70, and 71 west lying within the county of *Benson*	1	2
7.	All of the county of *Pierce* except the townships thereof which comprise a part of District No. 6; all of the county of *Rolette* except the townships thereof which comprise a part of District No. 9	1	2
8.	All of the county of *Benson* except the townships thereof which comprise a part of District No. 6; all of the county of *Ramsey* except the townships thereof which comprise a part of districts No. 9 and No. 12	1	2

No.	Description of Area	Members Senate	Members House
9.	County of *Towner;* townships 161, 162, 163, and 164 north of range 69 west lying within the county of *Rolette;* townships 157 and 158 north of ranges 60, 61, 62, 63, and 64 west lying within the county of *Ramsey;* townships 159, 160, 161, 162, 163, and 164 north of ranges 60, 61, 62, 63, and 64 west lying within the county of *Cavalier*	1	2
10.	All of the county of *Walsh* except the townships thereof which comprise a part of districts No. 11 and No. 12	1	2
11.	County of *Pembina;* townships 157 and 158 north of ranges 57, 58, and 59 west lying within the county of *Walsh;* townships 159, 160, 161, 162, 163, and 164 north of ranges 57, 58, and 59 west lying within the county of *Cavalier*	1	2
12.	County of *Nelson;* townships 155 and 156 north of ranges 57, 58, and 59 west lying within the county of Walsh; townships 153 and 154 north of range 61 west; townships 155 and 156 north of ranges 60 and 61 west lying within the county of *Ramsey;* townships 151 and 152 north of ranges 55 and 56 west including all of the city of Larimore; townships 153 and 154 north of ranges 53, 54, 55, and 56 west lying within the county of *Grand Forks;* all of the county of *Griggs* except the townships thereof which comprise a part of District No. 25	1	2

No.	Description of Area	Members Senate	Members House
13.	All of the county of *Grand Forks* except the townships thereof which comprise a part of District No. 12	4	8
14.	County of *McKenzie;* all of the county of *Dunn* except the townships thereof which comprise a part of District No. 15; all of the county of *Mercer* except the townships thereof which comprise a part of District No. 15	1	2
15.	County of *Golden Valley;* county of *Billings;* all of the county of *Stark* except the townships thereof which comprise District No. 16; townships 141, 142, 143, and 144 north of ranges 91, 92, 93, 94, 95, 96, and 97 west lying within the county of *Dunn;* townships 141, 142, and 143 north of ranges 88, 89, and 90 west lying within the county of *Mercer;* county of *Oliver*	1	2
16.	Townships 139 and 140 north of ranges 94, 95, 96, and 97 west lying within the county of *Stark*	1	2
17.	County of *Adams;* county of *Bowman;* county of *Hettinger;* county of *Slope*	1	2
18.	County of *Grant;* county of *Sioux;* townships 134, 135, and 136 north of range 84 west; township 137 north of ranges 85, 86, and 87 west; townships 138, 139, and 140 north of ranges 85, 86, 87, 88, 89, and 90 west lying within the county of *Morton*	1	2
19.	All of the county of *Morton* except the townships thereof which comprise a part of District No. 18	1	2

No.	Description of Area	Members Senate	Members House
20.	County of *McLean;* county of *Sheridan*	1	2
21.	County of *Burleigh;* townships 137, 138, 139, 140, 141, 142, 143, and 144 north of ranges 72, 73, and 74 west lying within the county of *Kidder*	3	6
22.	County of *Stutsman;* all of the county of *Kidder* except the townships thereof which comprise a part of District No. 21; townships 133, 134, 135, and 136 north of ranges 67, 68, 69, and 70 west lying within the county of *Logan;* townships 135 and 136 north of ranges 63 and 64 west; townships 133, 134, 135, and 136 north of ranges 65 and 66 west lying within the county of *LaMoure*	2	4
23.	County of *Eddy;* county of *Foster;* all of the county of *Wells* except the townships thereof which comprise a part of District No. 6	1	2
24.	County of *Barnes*	1	2
25.	County of *Steele;* county of *Traill;* townships 144, 145, 146, 147, and 148 north of range 58 west; townships 144 and 145 north of range 59 west lying within the county of *Griggs*	1	2
26.	All of the county of *Cass* except the parts thereof which constitute District No. 27	1	2
27.	The city of Fargo; the city of West Fargo; the city of West Fargo Industrial Park; township 140 north of range 48 west; sections 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, and 18 of township 139 north of range 49 west lying within the county of *Cass*	4	8

No.	Description of Area	Members Senate	House
28.	County of *Emmons;* all of the county of *Logan* except the townships thereof which comprise part of District No. 22; all of the county of *McIntosh* except the townships thereof which comprise a part of District No. 29	1	2
29.	County of *Dickey;* all of the county of *La-Moure* except the townships thereof which comprise a part of District No. 22; townships 129, 130, 131, and 132 north of ranges 67 and 68 west lying within the county of *McIntosh;* townships 129, 130, 131, and 132 north of ranges 57 and 58 west lying within the county of *Sargent;* townships 133, 134, and 135 north of ranges 57 and 58 west; township 136 north of range 58 west lying within the county of *Ransom*	1	2
30.	All of the county of *Ransom* except the townships thereof which comprise a part of District No. 29; all of the county of *Sargent* except the townships thereof which comprise a part of District No. 29; townships 129, 130, 131, 132, 133, 134, 135, and 136 north of ranges 51 and 52 west lying within the county of *Richland*	1	2
31.	All of the county of *Richland* except the townships thereof which comprise a part of District No. 29	1	2

Legislative District	Population	Population Senator	Deviation from Average[a]	Percent Deviation from Average[b]
1	14,167	14,167	—200	—1.39
2	13,992	13,992	—375	—2.61
3	14,240	14,240	—127	— .88
4	55,972	13,993	—374	—2.60[c]
5	14,216	14,216	—151	—1.05
6	14,248	14,248	—119	— .83
7	14,117	14,117	—250	—1.74
8	14,310	14,310	— 57	— .40
9	14,242	14,242	—125	— .87
10	14,159	14,159	—208	—1.45
11	14,012	14,012	—355	—2.47
12	14,300	14,300	— 67	— .47
13	57,407	14,352	— 15	— .10[c]
14	14,523	14,523	156	1.09
15	14,175	14,175	—192	—1.34
16	14,243	14,243	—124	— .86
17	14,292	14,292	— 75	— .52
18	14,450	14,450	83	.58

[a] Average population per senator is 14,367 (43 senators and 86 representatives).

[b] Range in deviation from average + 3.34 percent and — 2.61 percent variance = 5.95 percent.

[c] Multisenator district.

Legislative District	Population	Population Senator	Deviation from Average[a]	Percent Deviation from Average[b]
19	14,501	14,501	134	.93
20	14,483	14,483	116	.81
21	43,564	14,521	154	1.07[c]
22	29,156	14,578	211	1.47[c]
23	14,149	14,149	—218	—1.52
24	14,669	14,669	302	2.10
25	14,404	14,404	37	.26
26	14,266	14,266	—101	— .70
27	59,387	14,847	480	3.34[c]
28	14,483	14,483	116	.81
29	14,690	14,690	323	2.25
30	14,731	14,731	364	2.53
31	14,213	14,213	—154	—1.07
Total	617,761			

[a] Average population per senator is 14,367 (43 senators and 86 representatives).

[b] Range in deviation from average + 3.34 percent and − 2.61 percent variance = 5.95 percent.

[c] Multisenator district.

Original Section 26

Constitution of North Dakota

The senate shall be composed of not less than 30 nor more than 50 members.

Amendment to Section 26

Constitution of North Dakota

Enacted June 28, 1960

The senate shall be composed of 49 members.

Original Section 29

Constitution of North Dakota

The legislative assembly shall fix the numbers of senators, and divide the state into as many senatorial districts as there are senators, which districts, as nearly as may be, shall be equal to each other in the number of inhabitants entitled to representation. Each district shall be entitled to one senator and no more, and shall be composed of compact and contiguous territory; and no portion of any county shall be attached to any other county, or part thereof, so as to form a district. The districts as thus ascertained and determined shall continue until changed by law.

Amendment to Section 29

Constitution of North Dakota

Enacted June 28, 1960

Each existing senatorial district as provided by law at the effective date of this amendment shall permanently constitute a senatorial district. Each senatorial district shall be represented by one senator and no more.

Original Section 35

Constitution of North Dakota

The members of the house of representatives shall be apportioned to and elected at large from each senatorial district. The legislative assembly shall in the year 1895, and every tenth year cause an enumeration to be made of all the inhabitants of this state, and shall at its first regular session after each such enumeration, and also after each federal census, proceed to fix by law the number of senators, which shall constitute the senate of North Dakota, and the number of representatives which shall constitute the house of representatives of North Dakota, within the limits prescribed by this constitution, and at the same session shall proceed to reapportion the state into senatorial districts as prescribed by this constitution, and to fix the number of members of the house of representatives to be elected from the several senatorial districts; provided, that the legislative assembly may, at any regular session, redistrict the state into senatorial districts, and apportion the senators and representatives respectively.

Amendment to Section 35

Constitution of North Dakota

Enacted June 28, 1960

Each senatorial district shall be represented in the House of Representatives by at least one representative except that any senatorial district comprised of more than one county shall be represented in the House of Representatives by at least as many representatives as there are counties in such senatorial district. In addition the Legislative Assembly shall, at the first regular session after each federal decennial census, proceed to appor-

tion the balance of the members of the House of Representatives to be elected from the several senatorial districts, within the limits prescribed by this Constitution, according to the population of the several senatorial districts. If any Legislative Assembly whose duty it is to make an apportionment shall fail to make the same as herein provided it shall be the duty of the chief justice of the supreme court, attorney general, secretary of state, and the majority and minority leaders of the House of Representatives within ninety days after the adjournment of the legislature to make such apportionment and when so made a proclamation shall be issued by the chief justice announcing such apportionment which shall have the same force and effect as though made by the Legislative Assembly.

MAR 20
MICHAEL

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 73-1406

DANIEL CHAPMAN and JACQUE STOCKMAN,
Appellants,

vs.

BEN MEIER, Secretary of State for the
State of North Dakota,
Appellee.

JURISDICTIONAL STATEMENT

JOHN D. KELLY
609½ First Avenue North
Post Office Box 1389
Fargo, North Dakota 58102
Counsel for Appellants

St. Louis Law Printing Co., Inc., 812 Olive Street 63101 314-231-4477

INDEX

	Page
Table of Cases	ii
Table of Statutes	ii
Jurisdiction	2
Statutes Involved	7
Questions Presented	7
Statement	8
The Questions Presented Are Substantial	9
Multi-Member Districts	10
Population Variances Between Districts	13
Conclusion	14
Appendix	
Notice of Entry of Judgment	A-1
Memorandum Opinion and Order (Dated January 30, 1974)	A-2
Order (Dated May 22, 1972)	A-54
Memorandum Opinion and Order (Dated June 30, 1972)	A-57
Notice of Appeal to the United States Supreme Court (Dated February 27, 1972)	A-68
Map of Legislative Districts (Dobson Plan)	A-70

Table of Cases

American Federation of Labor v. Watson, 327 U.S. 582 . . 4

Connor v. Johnson, 402 U.S. 690 . . . . . 7, 8, 11, 12, 13

Connor v. Williams, 404 U.S. 549 11

Lucas v. Forty-Fourth General Assembly of Colorado, 377 U.S. 713 13

Mahan v. Howell, 410 U.S. 315 . . . . . 7, 9, 11, 12, 13

Minnesota State Senate v. Beens, 406 U.S. 187 . . . . . 5, 6

Paulson v. Meier, 232 F.Supp. 183 . . . . . 2, 3, 4

Paulson v. Meier, 246 F.Supp. 36 . . . . . 2, 3, 4, 11

Reynolds v. Sims, 377 U.S. 533 2

Skolnick v State Electoral Board of Illinois, 336 F.Supp. 839 4

Whitcomb v. Chavis, 403 U.S. 124 12

Table of Statutes

§ 106, Chapter 158, 1967 Laws of North Dakota 3

28 U.S.C. § 1253 . . . . . 2, 6

28 U.S.C. § 1331 2

28 U.S.C. § 1343 2

28 U.S.C. § 2281 . . . . . 2, 3, 4, 6

28 U.S.C. § 2284 . . . . . 3, 4, 6

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. .....

DANIEL CHAPMAN and JACQUE STOCKMAN,
Appellants,

vs.

BEN MEIER, Secretary of State for the
State of North Dakota,
Appellee.

JURISDICTIONAL STATEMENT

Appellants, Daniel Chapman and Jacque Stockman, appeal from the Judgment of the three-judge United States District Court for the District of North Dakota entered and rendered against appellants on January 30, 1974. The Opinion has not as yet been reported. A copy of the Opinion, including the dissent by Judge Bright, is included in the Appendix, together with the Court's Order of May 22, 1972, and the Memorandum Opinion and Order entered June 30, 1972, including the dissent by Judge Benson. These Orders have also not been reported.

JURISDICTION

This is an injunctive action against the North Dakota Secretary of State. The action was instituted pursuant to 28 U.S.C. §§ 1331, 1343, and 2281.

The Judgment appealed from is dated and was entered on January 30, 1974. Notice of Appeal was filed on February 27, 1972, in the United States District Court for the District of North Dakota.

Appellants believe 28 U.S.C. § 1253, confers jurisdiction on this Court.

The legislative apportionment plan giving rise to this lawsuit was not one enacted by the North Dakota Legislature. The determination by the District Court to convene a three-member Court as requested in appellants' Amended Complaint was nonetheless correct.

In 1964, on the basis of **Reynolds v. Sims,** 377 U.S. 533, a three-member District Court rejected a 1963 North Dakota legislative apportionment plan as well as voiding Sections 26, 29, and 35 of the North Dakota Constitution upon which the plan was based. **Paulson v. Meier,** 232 F.Supp. 183 (hereinafter **Paulson I**).

In 1965, the same three-member Court invalidated a new plan adopted by the North Dakota Legislature and ordered into affect a plan based upon the 1960 census. Among other things, this plan created five (5) multi-member senate districts. **Paulson v. Meier,** 246 F.Supp. 36 (hereinafter **Paulson II**).

The **Paulson II** apportionment plan was never formally adopted by the North Dakota Legislature. By enacting implementing legislation, the Legislature has ratified the **Paulson II**

plan as a part of North Dakota law. Thus, in 1967, the Legislature amended state election laws, particularly as they related to the organization of political parties so that parties would be organized along the lines of legislative districts. § 106, Chapter 158, **1967 Laws of North Dakota.** Historically, North Dakota law required the organization of parties on a county basis.

The **Paulson II** plan was accepted as legally obligating and was applied as part of the laws of North Dakota in primary, general, and special legislative elections subsequent to 1965. (There is, in fact, a real question as to the authority of the North Dakota Legislature to adopt its own reapportionment plan since the Constitutional provisions relating thereto that were voided in **Paulson I,** supra, have never been replaced.)

Upon the failure of the Legislature to apportion on the basis of the 1970 census, this action was commenced in November of 1971, seeking a determination that the **Paulson II** plan was no longer valid under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution and asking that the defendant be restrained and enjoined from administering the laws pertaining to the election of members of the North Dakota Legislature under the **Paulson II** plan.

Prior to May 12, 1972, then Chief Judge M. C. Matthes of the United States Court of Appeals for the Eighth Circuit, designated Myron H. Bright, Circuit Judge, Paul Benson and Bruce M. Van Sickle, District Judges, to hear the action pursuant to 28 U.S.C. §§ 2281, 2284.

By Order of May 22, 1972, the **Paulson II** plan was stricken as failing to meet Federal Constitutional standards, By Opinion and Order filed June 30, 1972, an interim plan was adopted (hereinafter "Dobson Plan"). Defendant Meier was directed to conduct only the 1972 elections under the plan. The Court retained jurisdiction to adopt a permanent plan following the 1972 elections.

In July of 1972, defendant Meier recognized the jurisdiction of this Court by applying for an Order staying the Order of June 30, 1972. The application for stay was denied by Mr. Justice Blackmun on July 17, 1972. No appeals were prosecuted by defendant from the 1972 Orders in this case.

Contrary to the June 30, 1972, Order, the Judgment entered on January 30, 1974, makes permanent the 1972 interim Dobson Plan, which includes five (5) multi-member districts containing up to fifteen (15) members, as well as creating legislative districts with population disparities of more than twenty per cent (20%).

Appellants can find no legislative reapportionment case brought before a United States District Court which was not actually heard by a three-judge panel in accordance with 28 U.S.C. §§ 2281, 2284.

For jurisdictional purposes, this case can properly be considered as a continuation of the **Paulson I** and **Paulson II** cases striking down North Dakota apportionment statutes. See **Skolnick v. State Electoral Board of Illinois,** 336 F.Supp. 839.

28 U.S.C. § 2281 has never been literally construed as being limited to state legislative enactments. In **American Federation of Labor v. Watson,** 327 U.S. 582, 591-593, this Court said:

> "Another preliminary question is whether this is a proper case for a three-judge court. The statute provides that only a three-judge court may issue an interlocutory injunction suspending or restraining 'the enforcement, operation or execution of any statute of a State by restraining the action of any officer of such State in the enforcement or execution of such statute.' Section 266 of the Judicial Code, 28 USCA § 380, 8 FCA title 28, § 380. The question is whether within the meaning of that section 'statute' is restricted to legislative enactments or includes provisions of

state constitutions as well. It is sometimes used to embrace all enactments, however adopted, to which a State gives the force of law. See Stevens v. Griffith, 111 US 48, 50. In speaking of § 266 we recently said, 'To bring this procedural device into play—to dislocate the normal operations of the system of lower federal courts and thereafter to come directly to this Court—requires a suit which seeks to interpose the Constitution against enforcement of a state policy, whether such policy is defined in a state constitution or in an ordinary statute or through the delegated legislation of an "administrative board or commission." The crux of the business is procedural protection against an improvident state-wide doom by a federal court of a state's legislative policy. This was the aim of Congress and this is the reconciling principle of the cases.' Phillips v. United States, 312 US 246, 251. And see Sterling v. Constantin, 287 US 378, 393. It would, as the court below stated, be somewhat incongruous to hold that a single judge, while prohibited from enjoining action under an act of the state legislature, would be free to act if the state constitution alone were involved. The policy underlying § 266 admits no distinction between state action to enforce a constitutional provision and state action to enforce an act of the legislature. There is no suggestion in the history of § 266 that Congress was willing to give the federal courts a freer hand when state constitutional provisions were involved. In our view the word 'statute' in § 266 is a compendious summary of various enactments, by whatever method they may be adopted, to which a State gives her sanction and is at least sufficiently inclusive to embrace constitutional provisions."

In **Minnesota State Senate v. Beens,** 406 U.S. 187, 195, this Court said:

"That the three-judge federal court possesses the power to reapportion the State's legislature when the applicable

state statutes fall short of constitutional requirements is not questioned. Reynolds v. Sims, 377 US 533, 586-587. The 1966 Minnesota apportionment legislation, the court found, in the light of the 1970 census figures no longer provided a constitutionally acceptable apportionment of either house. No one challenges that basic finding here, and we have no reason to rule otherwise. The 1971 legislature had endeavored to reapportion and, thus, to fulfill the requirement imposed upon it by Art. IV, § 23, of the State's Constitution. See Magraw v. Donovan, 163 F.Supp. 184, 187-188 (Minn. 1958), and Honsey v. Donovan, 236 F. Supp. 8 (Minn. 1964). The legislature's efforts in that direction, however, were nullified by the Governor's veto of the Act it passed, an action the executive had the power to take. Duxbury v. Donovan, 272 Minn. 424, 138 N.W. 2d 692 (1965). The net result was the continuing applicability of the 1966 act. Under these circumstances judicial relief was appropriate."

In terms of the appropriateness of convening a three-member District Court, there is no justifiable basis for distinguishing the North Dakota situation from the Minnesota one. In both cases, Constitutionally defective apportionment plans having the force of law were placed under attack. The very purpose Congress had in mind in enacting 28 U.S.C. §§ 2281, 2284, would be thwarted by a determination that the North Dakota case was not properly one for a three-member District Court.

As already indicated, jurisdiction here is based upon 28 U.S.C. § 1253. The Judgment appealed from is a final one establishing a permanent apportionment plan for the North Dakota Legislature based upon the 1970 census. Under **Minnesota State Senate v. Beens,** supra, and the numerous other decisions of this Court in state reapportionment appeals, this appeal is properly before the Court. Considering the final judgment of January 30, 1974, together with the prior Orders of

May 22, 1972, and June 30, 1972, appellants have, in fact, been denied the injunctive relief sought under their Amended Complaint. While the apportionment plan originally under attack has been voided, the Court-fashioned replacement is also Constitutionally deficient. The plan is also contrary to the directive in **Connor v. Johnson,** 402 U.S. 690, relating to single-member legislative districts.

STATUTES INVOLVED

Fourteenth Amendment to the Constitution of the United States.

QUESTIONS PRESENTED

1. In the absence of a showing that multiple-member legislative districts are Constitutionally invalid as discriminatory or otherwise violative of the United States Constitution, could the District Court ignore the general rule concerning the creation of single-member legislative districts in Court-fashioned reapportionment plans as set out in **Connor v. Johnson,** 402 U.S. 690?

2. Are the disparities in population among legislative districts under the Court-fashioned reapportionment plan for the North Dakota Legislature violative of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution; and if not, did the District Court, in fashioning the reapportionment plan, possess the same broad latitude and discretion as is afforded state legislatures under **Mahan v. Howell,** 410 U.S. 315, in adopting reapportionment plans containing population disparities among legislative districts?

STATEMENT

The procedural history has been set out above under the jurisdiction analysis.

In rejecting appellants' claim that the permanent apportionment plan for the North Dakota Legislature should establish single-member districts, the District Court said:

> "The tenor of the Supreme Court decisions with respect to reapportionment, clearly does not compel institution of single-member districts in North Dakota. The circumstances existing in this state contrast with those existing in states where apportionment plans were found constitutionally deficient. The complexion of the state and of individual cities within the state does not present any showing of unrepresented minorities or unresponsive representatives.
>
> "The issue of multi-member districts or single-member districts is clearly a political issue to be resolved by the electorate and the legislature. In devising a plan, this Court will go no further than is required to formulate a constitutionally sufficient apportionment plan for the State of North Dakota, and will not intrude on the political realm." (Appendix, p. A-11)

On this issue, Judge Bright, in his dissent, noted:

> "Thus, although multi-member districting does not amount to an Equal Protection violation, there are sufficient undesirable characteristics adhering to it to justify restricting its use in court-fashioned plans, absent special circumstances. This is precisely the rule which must control our decision in the case at bar, and it was enunciated by the Supreme Court under its supervisory power over federal courts in **Connor v. Johnson,** 402 U.S. 690 (1971)." (Appendix, p. A-41)

The majority opinion justified population disparities under the Dobson Plan on the following basis:

> "Where there are identifiable minorities or political groups being forced out of the election process **and** their voting strength is **invidiously** weakened, a plan proper in other respects may require a further examination. As we view the cases, deviations of 16%, 8%, and 10% have recently been allowed in heavily populated states having significant minority populations.
>
> "Even greater deviations are permissible in a sparsely settled state barren of electorally victimized minorities." (Author's Emphasis) (Appendix, pp. A-15-A-16)

Again, Judge Bright dissented, noting:

> "Here, however, I cannot say that on the present record the Dobson Plan 'has not sacrificed substantial equality to justifiable deviations'. Not only does the Plan include a deviation greater than the 16.4 percent upheld in **Mahan,** but more importantly it is not justified by any rational state policy now in effect. It is clear for example that the State of North Dakota has not adopted, either by legislative action or otherwise, a firm policy of strictly adhering to political subdivision lines, such as the Virginia policy found so important by the Supreme Court in **Mahan.** Absent some such policy to justify the large population deviation of the Dobson Plan, the Equal Protection Clause requires this court to adopt an apportionment plan with less variance between districts." (Appendix p. A-50)

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

Appellants believe that this is a proper case for reversal and remand without oral argument. The dissent by Judge Bright correctly sets out the law as well as the procedures that should

be invoked by the District Court upon remand to fashion an apportionment plan that meets both Constitutional standards and the directives of this Court. Summary disposition is appropriate, not because the questions raised are insubstantial. Rather, the District Court's position is so obviously contrary to the decisions of this Court and the Constitution of the United States as not to require extended consideration prior to reversal. Such a speedy disposition would permit the development of a proper reapportionment plan by the District Court in time for the 1974 primary and general elections. The people of North Dakota have, for too long, been saddled with unjust apportionment plans. That burden ought to be lifted now.

Alternatively, should the Court determine that the substantial questions raised by this appeal require plenary consideration, we ask that probable jurisdiction be noted.

Each of the two questions raised is discussed below. Because of the detailed consideration of both issues by Judge Bright in his dissent (Appendix, pp. A-22-A-53), the discussion will be abbreviated. Appellants adopt the analysis set out in Judge Bright's dissent on both issues raised in this appeal.

Multi-Member Districts

The Dobson Plan as fashioned by a majority of the District Court contains five (5) multi-member senate districts. The largest is District 21, which is entitled to elect fifteen (15) legislators—five (5) senators and ten (10) representatives. Districts 5 and 18 are entitled to four (4) senators and eight (8) representatives each. The portion of District 5 comprising the Minot Air Force Base is an island in the midst of District 3, distant from the rest of District 5. The same type island arrangement holds true for that part of District 18 that comprises the Grand Forks Air Force Base. It sits in the middle of District 19, miles

from the remainder of District 18. If a legislature drew district lines in such a fashion, the accusations of gerrymandering would be thunderous. District 32 has three (3) senators and six (6) representatives, and District 29 has two (2) senators and four (4) representatives. All other of the thirty-eight (38) legislative districts created by the Dobson Plan have one (1) senator and two (2) representatives.

Since statehood and until imposition of the **Paulson II** plan in 1965, all senators were elected from separate districts in accordance with Section 29 of the North Dakota Constitution. Historically, representatives were elected from multi-member districts, usually two (2) from each senate district. Presumably this bit of history explains why the majority in the Order filed June 30, 1972 (Appendix, pp. A-57-A-65) and Judge Bright in his dissent of January 30, 1972 (Appendix, pp. A-22-A-53) were not prepared to go beyond ordering single-member senate districts that would also elect two (2) house members. Appellants originally asked the District Court to establish single-member house districts. However, in view of the long historical precedent for two (2)-member house districts in North Dakota, the point is not pursued. Of course, the equally strong precedent of single-member senate districts lends support to the claim that the continuation of multi-member senate districts under the Dobson Plan is contrary to long established state policy.

In **Connor v. Johnson,** 402 U.S. 690, 692, this Court said:

> "Where district courts are forced to fashion apportionment plans, single member districts are preferable to large multi-member districts as a general rule."

The rule was reaffirmed in **Connor v. Williams,** 404 U.S. 549, and **Mahan v. Howell,** 410 U.S. 315. The District Court analyzed **Connor v. Johnson,** supra, as invalidating multi-member districts where they are racially discriminatory and thus Constitu-

tionally invalid. That analysis is fundamentally erroneous. Otherwise, a universal rather than general rule would have been enunciated. Upon a showing of racial discrimination in violation of the Constitution, no multi-member district can be sustained, whether by legislative enactment or Court-fashioned. **Connor v. Johnson,** supra, is simply not a racial discrimination case.

The trial court has assumed a discretion it does not possess. The standards applying to judicial review of legislative plans, as articulated in cases such as **Whitcomb v. Chavis,** 403 U.S. 124, simply do not apply to Court-fashioned plans. The reason for allowing great flexibility and latitude to a state legislature are wholly absent here. The fundamental error in the majority opinion is the assumption that because a state legislature can create multi-member districts without a per se violation of the Fourteenth Amendment to the United States Constitution, a District Court is free to do so.

Appellants recognize that in accordance with **Mahan v. Howell,** supra, there may be unique factors requiring multi-member districts, either temporarily or permanently. Indeed, the special circumstances existing in connection with the Grand Forks and Minot Air Force Bases may require some type of multi-member districts. (The population of these two bases would entitle each to be represented by one (1) senator and two (2) representatives. The number of votes cast as base precincts is minimal.) Appellants do not agree that attaching the air bases to remote, large multi-member districts is any part of the solution to the special circumstances existing with regard to these military installations.

The majority opinion emphasizes that the appellants did not assume the burden of establishing that multi-member districts were violative of the Constitution. That is absolutely correct. The burden was not assumed because it was unnecessary for

appellants to do so. Under **Connor v. Johnson,** supra, the test is not a Constitutional one. At least since **Lucas v. Forty-Fourth General Assembly of Colorado,** 377 U.S. 713, this Court has recognized the undesirable features of large multi-member legislative districts.

The reconstituted majority tells appellants that they are to look to the legislature to do away with multi-member districts. But the legislature did not impose the system upon the people of North Dakota. The United States District Court did so in the face of a tradition since statehood of single-member senate districts. Now, the majority perpetuates such a plan in the face of the decisions to the contrary by this Court. The majority does so in a decision that wholly fails to articulate acceptable reasons or unique circumstances that justify creation of large multi-member districts.

Population Variances Between Districts

The District Court justifies the imposition of a permanent apportionment plan containing population disparities among the districts which exceed twenty per cent (20%) of the authority of **Mahan v. Howell,** supra. Actually, the Court has gone beyond the population deviations permitted on a Constitutional basis in **Mahan.** The majority opinion is wholly lacking in acceptable reasons for the variations among district populations contained in the Dobson Plan. We cannot believe that the flexibility given state legislatures as to variations in district populations under **Mahan v. Howell,** supra, was ever intended to be extended to Federal District Courts when they are required to fashion reapportionment plans. Again, the District Court has assumed for itself a discretion and latitude that it does not possess. We believe that the Dobson Plan should be rejected on this basis.

Alternatively, if the "one man, one vote" concept is to maintain any validity at all, then under the Equal Protection Clause

of the Fourteenth Amendment, the population variances among the districts under the Dobson Plan should be declared Constitutionally excessive.

CONCLUSION

The Dobson Plan is contrary to the directives of this Court and offends the Constitution of the United States. Upon the filing of a Rule 16 Motion by appellee, the Judgment of the District Court should be summarily reversed and the case remanded for further proceedings in accordance with the dissent by Judge Bright which correctly sets out the law and procedures to be used in fashioning an apportionment plan for the North Dakota Legislature. It is our belief that while the questions submitted by this appeal are substantial and far-reaching, their resolution is readily dictated by the prior decisions of this Court which have simply been misread by a majority of the three-member District Court.

Of course, should this Court determine that further consideration is in order, we ask that probable jurisdiction be noted and the case accepted for further briefing and argument.

Dated this 11th day of March, 1974.

Respectfully submitted

JOHN D. KELLY
609½ First Avenue North
Post Office Box 1389
Fargo, North Dakota 58102
(701) 237-6983
Attorney for Appellants

APPENDIX

In the United States District Court for the District of North Dakota, Southeastern Division

Daniel Chapman and Jacque Stockman,
Plaintiff(s),
vs.
Ben Meier, Secretary of State for the State of North Dakota,
Defendant.
Civil No. 4464

Notice of Entry of Judgment

Please Take Notice that the above Judgment, of which the inclosed is a copy was duly entered in the above entitled action on January 30, 1974.

Dated this 30th day of January, 1974.

CLETUS J. SCHMIDT
Clerk
By RALPH E. HARMON
Deputy Clerk

Copies to:

Mr. John D. Kelly, Attorney at Law, 609½ First Ave. N., Fargo, North Dakota 58102

Mr. Paul M. Sand, Ass't Atty. General, State Capitol, Bismarck, North Dakota 58501

In the United States District Court for the District of North Dakota, Southeastern Division

Daniel Chapman and Jacque Stockman, Plaintiffs, v. Ben Meier, Secretary of State for the State of North Dakota, Defendant.	Civil No. 4664

Before Bright, Circuit Judge; Benson, Chief District Judge, and Van Sickle, District Judge.

Memorandum Opinion and Order

(Filed January 30, 1974)

Benson, Chief Judge.

On May 18, 1972, this three judge district court panel heard evidence and oral argument on the constitutionality of the North Dakota legislative apportionment plan then in effect. On May 22, 1972, we entered an order requiring reapportionment of the state legislative districts to conform to the "one man, one vote" requirement of the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution.

Thereafter, on June 30, 1972, this Court filed its Memorandum Opinion and Order, Judge Benson dissenting in part, adopting an interim apportionment plan effective only for the impending 1972 general election. The plan provided for thirty-

nine senatorial districts, five of which were multi-member. It increased the size of the state senate by two and increased the state house of representatives by four. It decreased the number of legislative districts from thirty-nine to thirty-eight. The plan recognized that the interests of those persons residing on the air bases at Grand Forks and Minot were more closely aligned with urban than with rural interests, and included those populations within the nearby urban districts. The multi-member districts retained are located in the cities of Fargo, Grand Forks, Minot, Bismarck and Jamestown.

The Court retained jurisdiction over the cause, and directed its commission of three special masters to study and report upon a more permanent plan. Subsequently, on motion by Defendant Meier, the Court, on November 8, 1972, ordered that further action be deferred pending the possible adoption of a new apportionment plan by the 43rd Legislative Assembly of the State of North Dakota, in its 1973 session.

Over the veto of the Governor, the Legislature adopted an apportionment plan which continued the multi-member districts substantially as provided in the Court's plan, and as had existed in the state since 1965. The Governor's principal objection to the Legislature's plan centered on the multi-member senate districts.[1]

The operation of the plan adopted by the Legislature was suspended by referendum petition. By initiative petition, an amendment to the Constitution of North Dakota was proposed which would create a commission to reapportion the state and which would mandate the creation of single member senatorial districts. A statewide special election on the referred plan of the Legislature and the initiated constitutional amendment was

---

[1] Governor's veto message, Defendant's Report to the Court, filed March 30, 1973.

held on December 4, 1973. Both measures were defeated. Therefore, the obligation to make a final determination on a reapportionment plan for the legislative districts of the State of North Dakota remains with this Court.

The plaintiffs urge the Court to proceed in accordance with its Memorandum Opinion and Order of June 29, 1972, wherein the majority suggested that if a new, more permanent, plan had to be fashioned by the Court, it would probably establish single member districts in light of **Connor v. Johnson,** 402 U.S. 690 (1971):

> "When district courts are forced to fashion apportionment plans, single-member districts are preferable to large multi-member districts as a general rule." at 692.

On the other hand, the Defendant argues that this Court is not compelled by the **Connor** decision to create single member districts and urges us, in light of the apportionment decisions of the United States Supreme Court that have been rendered since June 29, 1972, to adopt the June 29, 1972 Court plan (the Dobson Plan)[2] as the permanent plan for the State of North Dakota.

Evidence before this Court indicates that North Dakota is a sparsely settled, agricultural state with declining populations in most localities outside the urban areas. The state has fifty three counties. Most minor civil divisions in rural areas have very small populations that are becoming smaller. The 1970 Federal Census for North Dakota showed an overall state population of 617,761 persons, and a population density of 8.9 persons per square mile. The overall loss in population to North Dakota between 1960 and 1970 on a statewide basis was 2.3%. In 1960, the urban-rural population was divided 35.2% urban and 64.8% rural. In 1970, it was 55.7% ur-

---

[2] Richard R. Dobson, one of the Special Masters appointed by the Court.

ban and 44.3% rural. A total of 183 census county divisions are composed of mainly open country. Ten of these had more than 2,500 inhabitants in 1970, and thirty nine (21.3%) had fewer than 1,000. The two smallest divisions had less than 500 inhabitants. The two largest census county divisions in this group had 1970 populations of 12,608 and 12,927, and contained the Grand Fords and Minot Air Force Bases.[3]

In hearings before the Joint Committee on Reapportionment held on January 3, 1973, State Representative Earl C. Rundle indicated that in Billings County there are 72 sections of land with no people residing on them. The total population of that county is 1,198. The population of the four largest cities in North Dakota in descending order are: Fargo, 53,365; Grand Forks, 39,008; Bismarck, 34,703; Minot, 32,290.[4]

Special Master Dobson, in presenting his plan, which with some minor amendments, was adopted by the Court on June 29, 1972, as an "interim" plan commented:

> "The plan observes natural geographical barriers, such as the Missouri River . . . and . . . every district is connected with good arterial roads. It should not be necessary to travel outside of one's district in going from one part of it to another."
>
> "In the formation of districts, parts of 10 counties are attached to an adjoining county or counties. However, in three instances (Burleigh, Ward and Williams), no real violence is done to county lines because an urban district is sealed off and the rural portion of the county is attached to a neighboring rural county. Three other counties which are divided (Barnes, Richland and Walsh) have

---

[3] Stanley W. Voelker and Thomas K. Ostenson, Population Changes within Census County Divisions of North Dakota, 1950-1970, March, 1971.

[4] 1970 Census of Population, U.S. Dept. of Commerce, Bureau of the Census, 1970.

traditionally been split into two districts. Thus, only four counties (McHenry, Cass, Morton and Stark) suffer any damage in the districting.

"In this connection, it should be noted that the greatest complaints about the existing apportionment were voiced over the breaking of county lines, particularly in smaller rural counties. Counties with very small populations should not be split because they are thereby rendered politically powerless. It is a form of de facto disenfranchisement."

In its Order of June 29, 1972, this Court found that reapportionment was required because of the general population shift from rural to urban centers in North Dakota which "created constitutionally impermissible variations in population among the existing legislative districts of North Dakota".

The following is a chart of the plan adopted by this Court and is inserted in this Opinion to illustrate that it cures the "constitutionally impermissible variations", which were the basis for the court ordered reapportionment.

North Dakota Population—1970 Census 617,761

Number of Senators Provided for in Court Plan 51

Population per senator (absolute equality) 12,112

District Number	No. of Senators	Population Per Senator	Percentage Variance From Absolute Equality	Population Variance From Absolute Equality
1	1	12,250	− 1.13%	138
2	1	11,615	+ 4.10%	497
3	1	12,481	− 3.04%	369
4	1	13,176	− 8.71%	1064
5	4	12,477	− 3.01%	365
6	1	11,840	+ 2.24%	272

District Number	No. of Senators	Population Per Senator	Percentage Variance From Absolute Equality	Population Variance From Absolute Equality
7	1	12,956	− 6.98%	844
8	1	11,251	+ 7.10%	861
9	1	11,549	+ 4.65%	563
10	1	12,858	− 6.15%	746
11	1	10,728	+11.43%	1384
12	1	12,349	− 1.96%	237
14	1	12,679	− 4.68%	567
15	1	12,915	− 6.62%	803
16	1	11,296	+ 6.73%	816
17	1	10,731	+11.42%	1381
18	4	12,561	− 3.70%	449
19	1	10,859	+10.41%	1253
20	1	11,534	+ 4.78%	578
21	5	12,048	+ 0.05%	64
22	1	11,448	+ 5.48%	664
23	1	11,007	+ 9.12%	1105
24	1	11,598	+ 4.24%	514
25	1	12,799	− 5.68%	687
26	1	12,913	− 6.61%	801
27	1	12,392	− 2.31%	280
28	1	11,362	+ 6.11%	750
29	2	11,775	+ 2.79%	337
30	1	12,745	− 5.23%	633
31	1	12,712	− 4.96%	600
32	3	11,865	+ 2.04%	247
33	1	13,075	− 7.96%	963
34	1	12,215	− 0.09%	103
35	1	12,158	− 0.04%	46
36	1	11,021	+ 9.92%	1091
37	1	12,405	− 2.42%	293
38	1	12,566	− 3.75%	454
39	1	12,743	− 5.21%	631

The majority of this Court has concluded that the interim plan should be adopted as the permanent plan. Judge Bright, in dissenting, is concerned with the fact that Districts 5, 18, 21, 29 and 32 are multi-member districts, and with the fact that the 11.43% overrepresentation in District 11, coupled with the 8.71% underrepresentation in District 4, creates what he feels to be an impermissible variation of 20.14%.

I. MULTI-MEMBER DISTRICTS

There has been no showing before this Court that multi-member districts, which have existed in North Dakota since 1965, have resulted in discrimination of any kind against any groups. Plaintiff's counsel, in his brief filed with the Court on May 5, 1972, said: "Plaintiffs do not assume the burden of establishing that multi-member senate and house districts are violative of the United States Constitution." Relying on **Connor**, the thrust of the contention appears to be that multi-member districts cannot be allowed to continue because they were initially fashioned by the Court.

The situation in Mississippi, faced by the court in **Connor,** is obviously quite different from that which exists in North Dakota. According to the 1970 census, the State of Mississippi has a population of 2,216,912, and a population density of 49.6 persons per square mile. The white population is 1,393,293; the black population is 815,770.[5] In North Dakota, except for the Indian Reservations, none of which are included in the multi-member senate districts, there are no identifiable minorities.

Four days after its decision in **Connor,** the Supreme Court handed down **Whitcomb v. Chavis,** 403 U.S. 124 (1971), wherein it reviewed the decision of a three judge court con-

---

[5] 1973 World Almanac, Newspaper Enterprise Association.

vened to consider whether two Indiana statutes had the effect of diluting the vote of Negroes and poor people living in Marion County (City of Indianapolis). The district court panel concluded that the existing multi-member district must be separated because of strong differences in minority groups, housing income and educational levels. With respect to Marion County, the three judge panel drafted and adopted a plan said to protect the "legally cognizable racial minority group against dilution of its voting strength," 307 F.Supp. 1362, at 1365 (S.D. Ind. 1969). On appeal, the Supreme Court, in passing on the redistricting of Marion County into single member districts, reversed, saying that while **Reynolds v. Sims,** 377 U.S. 533 (1964), recognizes the right of every citizen to full and effective participation in the political processes of his state's legislative bodies, that decision did not render multi-member districts impermissible.

> "In our view, however, experience and insight have not yet demonstrated that multi-member districts are inherently invidious and violative of the Fourteenth Amendment. Surely the findings of the District Court do not demonstrate it. Moreover, if the problems of multi-member districts are unbearable or even unconstitutional it is not at all clear that the remedy is a single-member district system with its lines carefully drawn to ensure representation to sizable racial, ethnic, economic, or religious groups and with its own capacity for overrepresenting parties and interests and even for permitting a minority of the voters to control the legislature and government of a State The short of it is that we are unprepared to hold that district-based elections decided by plurality vote are unconstitutional in either single- or multi-member districts simply because the supporters of losing candidates have no legislative seats assigned to them. As presently advised we hold that the District Court misconceived the Equal Protection Clause in applying it to invalidate the Marion County multi-member district." 403 U.S. at 159-160.

Citing particular problems which might render a multi-member plan ineffective, **Whitcomb** announced that the circumstances of each case must be considered.

In **Fortson v. Dorsey,** 379 U.S. 433 (1965), the Supreme Court specifically held that multi-member districts were not per se illegal under the Equal Protection Clause.

In the 1973 case of **Mahan v. Howell,** 410 U.S. 315 (1973), the court noted that considerations of substantial malapportionment with respect to military personnel and combinations of other unique factors must be considered in preferring single-member over multi-member districts or vice versa.

In the case of **White v. Register,** 41 U.S.L.W. 4885, 37 L. Ed.2d 314 (U.S. June 18, 1973), the Supreme Court was called upon to consider a Texas reapportionment plan. Again the Court stated that multi-member districts are not unconstitutional per se (citing **Whitcomb, Mahan** and **Sims**) but where the claim is that such districts are being used **invidiously** to cancel out or minimize the voting strength of racial groups, they must be questioned.

The Texas multi-member districts, it was found, did operate to exclude the black community from the electoral process. This case points up one of the basic foundations common to all cases finding multi-member districts unconstitutional; that is, invidious discrimination against some visible minority group. **See also Hernandez v. Texas,** 347 U.S. 475 (1954), involving Mexican-Americans.

The group must be identifiable and must be effectively removed from the electoral process by reason of the districting scheme. As the Court in **White** notes, not every racial or political group has a constitutional right to be represented in the state legislature. 37 L.Ed.2d at 326. Earlier in **Whitcomb,** the court commented that were every group entitled to representa-

tion, the result would be inane for within every district there are workers, university communities, religious and ethnic groups occupying identifiable areas.

A court, in considering various reapportionment options before it, should go only as far as is necessary in order to meet the constitutional requirements of "one man, one vote." **Minnesota State Senate v. Beens,** 406 U.S. 187 (1972).

The tenor of the Supreme Court decisions with respect to reapportionment, clearly does not compel institution of single-member districts in North Dakota. The circumstances existing in this state contrast with those existing in states where apportionment plans were found constitutionally deficient. The complexion of the state and of individual cities within the state does not present any showing of unrepresented minorities or unresponsive representatives.

The issue of multi-member districts or single-member districts is clearly a political issue to be resolved by the electorate and the legislature. In devising a plan, this Court will go no further than is required to formulate a constitutionally sufficient apportionment plan for the State of North Dakota, and will not intrude on the political realm.

II. VARIANCE

While we are satisfied that the Court plan adopted June 29, 1972, is not constitutionally deficient by reason of the multi-member districts, consideration must be given to the realm of permissible variance. This Court, by its order filed May 22, 1972, appointed three special masters to serve as a commission to formulate an apportionment plan. The following guidelines to the commission were offered by the Court:

> "a. The Commission shall try to conform new legislative districts to the existing districts.

b. The Commission shall not substantially change the size of the Legislature.

c. Natural geographic barriers shall be observed.

d. Existing political subdivision lines should be observed, in so far as possible.

e. In the event the Commission should find that it is unnecessary to substantially alter any one or more of the legislative districts presently defined, then it must consider and make recommendations relative to whether or not the incumbent senator or senators, whose term does not expire at the end of this year, must nevertheless stand for election in 1972."

One of the unique features existing in North Dakota is the Missouri River, which separates the state into two parts—two-thirds to the east and one-third to the west. The river traversing the state is crossed by only six highway bridges, four of them located in the area of Williston and Bismarck. This geographical reality, coupled with the difficulty of achieving the goals of observing geographical boundaries and existing political subdivisions, adds to the difficulty of minimizing the variance. That it was substantially accomplished, as illustrated by the chart made a part of this opinion, attests to the validity and soundness of the plan. The population variance between the districts in most cases is only a few hundred people. As a general rule, deviations from the average population decreases if many county lines are violated, and increases if few are split. The effort to preserve urban-rural identities and county lines intact produce the variations which look large perecntage wise, but when applied to a sparsely populated state do not result in significant population variances.

In **Mahan,** the court considered the validity of a Virginia apportionment plan allowing for a 16% deviation. The Court

stated that neither courts nor legislatures, can extract with accuracy from the Fourteenth Amendment, the mathematical formula that establishes what range of percentage deviation is permissible and what is not. While the 16% deviation of the Virginia plan may have approached the limits, it did not exceed them, said the Court.

The key, it seems, as to whether a certain deviation will be allowable is whether or not the deviation causes a sacrifice of substantial equality. A percentage of variance can only have validity when measured against the actual number of electors, communities of interest, transportation, and size of the base from which the representation is drawn.

Virginia is a heavily populated state, and a 16% deviation there results in population discrepancies of thousands. That same percentage applied to a sparsely populated state like North Dakota, would result in actual deviations of only a few hundred persons.

The issue presented to the court in **Mahan** was whether or not the equal protection clause permits only limited population variances which are unavoidable, despite a good faith effort to achieve absolute equality. The court said that some variation from the one man, one vote rule is unavoidable, because blind application of "absolute equality" in state redistricting might well impair the normal functioning of state and local governments.

In **Swann v. Adams**, 385 U.S. 440 (1967), the Supreme Court disapproved a Florida reapportionment plan having a 26% deviation. The Court, noting that no evidence in support of the deviation had been offered, said the allowable variation for one state has little bearing on the validity of a similar variation in another state.

In 1972, a three judge district court in **White v. Register,** 343 F.Supp. 704 (W.D. Tex. 1972), declared unconstitutional

a Texas reapportionment plan having a total variation between the largest and smallest district of 9.9%. On appeal, the Supreme Court in **White v. Register,** 41 U.S.L.W. 4885, 37 L.Ed. 2d 314 (U.S. June 18, 1973), said that a 9.9% deviation does not establish a prima facie equal protection violation. Citing **Mahan,** the Court said that relatively **minor population** deviations among state legislative districts do not substantially dilute the weight of individual votes in the larger districts.

Similarly, **Gaffney v. Cummings,** 41 U.S.L.W. 4891, 37 L.Ed.2d 298 (U.S. June 18, 1973), decided at the same time as **White,** held that a state's redistricting plan is not to be judged by the more stringent standards applicable to Congressional reapportionment. In **Gaffney,** the Court said that while fair and equal representation is the goal, its attainment does not depend on elimination of insignificant population variations.

> "Fair and effective representation may be destroyed by gross population variations among districts, but it is apparent that such representation does not depend solely on mathematical equality among district populations. There are other relevant factors to be taken into account and other important interests that states may be legitimately mindful of. An unrealistic overemphasis on raw population figures, a mere nose count in the districts, may submerge these other considerations and itself furnish a ready tool for ignoring factors that in a day-to-day operation are important to an acceptable representation and apportionment arrangement."
>
> "That the Court was not deterred by the hazards of the political thicket when it undertook to adjudicate the reapportionment cases does not mean that it should become bogged down in a vast, intractable apportionment slough, particularly when there is little, if anything, to be accomplished by doing so.

"This very case represents what should not happen in the federal courts. The official state functionaries proposed a plan with a maximum variation among the districts of 7.89% in the House and 1.8% in the Senate, and with respective average variations of 1.9% and .45%. Appellees then proposed four alternative plans for the House, three of which involved slightly larger variations among districts but cut fewer town lines. The fourth cut more lines, but had a maximum variation between its largest and smallest district of only 2.6%. The District Court thought the state plan involved acceptably large variations between districts, although in the House, with districts of about 20,000 people, the average variation involved only 399 people, and the largest variations involved only 1,573 people. But neither did the District Court adopt any of the plans submitted by appellees. Instead, it appointed its own master to come up with still another scheme. That plan, we are told, involves a total maximum deviation in the House of only 1.16%. Was the master compelled, as a federal constitutional matter, to come up with a plan with smaller variations than were contained in appellees' plans? And what is to happen to the master's plan if a resourceful mind hits upon a plan better than the master's by a fraction of a percentage point? Involvements like this must end at some point, but that point constantly recedes if those who litigate need only produce a plan that is marginally 'better' when measured against a rigid and unyielding population equality standard." at 309-311 (citations omitted).

Once a plan has been formulated which, in consideration of all the attendant circumstances, fairly meets the constitutional requirements, a court should not continue to sift and shuffle abstract figures solely to arrive at a mathematically perfect plan.

Where there are identifiable minorities or political groups being forced out of the election process and their voting

strength is **invidiously** weakened, a plan proper in other respects may require a further examination. As we view the cases, deviations of 16%, 8%, and 10% have recently been allowed in heavily populated states having significant minority populations.

Even greater deviations are permissible in a sparsely settled state barren of electorally victimized minorities.

We adopt the Court Plan of reapportionment previously adopted as an interim plan on June 29, 1972, as set forth in Appendix A of that Order, as the permanent plan for reapportionment for the State of North Dakota. A copy of the plan is attached hereto as Appendix A.

It Is Ordered that judgment be entered accordingly.

Dated this 30th day of January, 1974.

/s/ PAUL BENSON
Chief Judge
United States District Court

/s/ BRUCE M. VAN SICKLE
Judge
United States District Court

Appendix A

The legislative districts of the state shall be formed, and senators and representatives shall be apportioned as follows:

1. The first legislative district shall consist of the City of Williston and Stony Creek and Williston Townships in Williams County, and shall be entitled to one senator and two representatives:

2. The second legislative district shall consist of Divide County and all of Williams County except that portion contained in the first legislative district, and shall be entitled to one senator and two representatives;

3. The third legislative district shall consist of Renville County and all of Ward County except that portion contained in the fifth legislative district, and shall be entitled to one senator and two representatives;

4. The fourth legislative district shall consist of Burke and Mountrail Counties, and shall be entitled to one senator and two representatives;

5. The fifth legislative district shall consist of the City of Minot, Afton, Burlington, Harrison, Nedrose, Sundre and Surrey Townships, and the area lying within the boundaries of the Minot Air Force Base (such area being attached to the aforesaid by that land lying within the right of way of U. S. Highway 83), all in Ward County, and shall be entitled to four senators and eight representatives;

6. The sixth legislative district shall consist of Bottineau County and Willow Creek, Mouse River, Meadow, Deep River, Pratt, Normal, Bantry, Layton, Little Deep, Grilley, Wager, Gilmore, Saline, Deering, Denbeigh, Riga, Egg Creek, Kottke Valley, Granville and Norwich Townships and Townships 157-75, 157-76 and 158-76 in McHenry County, and shall be entitled to one senator and two representatives;

7. The seventh legislative district shall consist of Pierce County and all of McHenry County except that portion contained in the sixth legislative district, and shall be entitled to one senator and two representatives;

8. The eighth legislative district shall consist of McLean County, and shall be entitled to one senator and two representatives;

9. The ninth legislative district shall consist of Rolette County, and shall be entitled to one senator and two representatives;

10. The tenth legislative district shall consist of Cavalier and Towner Counties, and shall be entitled to one senator and two representatives;

11. The eleventh legislative district shall consist of Pembina County, and shall be entitled to one senator and two representatives;

12. The twelfth legislative district shall consist of Benson and Eddy Counties, and shall be entitled to one senator and two representatives;

14. The fourteenth legislative district shall consist of Foster and Wells Counties, and shall be entitled to one senator and two representatives;

15. The fifteenth legislative district shall consist of Ramsey County, and shall be entitled to one senator and two representatives;

16. The sixteenth legislative district shall consist of St. Andrews, Martin, Farmington, Glenwood, Acton, Oakwood, Grafton, Fertile, Kensington, Pulaski, Harriston, Walshville and Ardoch Townships in Walsh County, and shall be entitled to one senator and two representatives;

17. The seventeenth legislative district shall consist of Nelson County and all of Walsh County except that portion contained in the sixteenth legislative district, and shall be entitled to one senator and two representatives;

18. The eighteenth legislative district shall consist of the City of Grand Forks, Grand Forks Township, and the area lying within the boundaries of Grand Forks Air Force Base (such area being attached to the aforesaid by that land lying within the

right of way of U.S. Highway 2), all in Grand Forks County, and shall be entitled to four senators and eight representatives;

19. The nineteenth legislative district shall consist of all of Grand Forks County except that portion contained in the eighteenth legislative district, and shall be entitled to one senator and two representatives;

20. The twentieth legislative district shall consist of Trail County and Noble, Kinyon, Bell, Hunter, Wiser, Gardner, Gunkel and Arthur Townships in Cass County and shall be entitled to one senator and two representatives;

21. The twenty-first legislative district shall consist of the Cities of Fargo, West Fargo and West Fargo Industrial Park, and Fargo, Barnes and Reed Townships, all in Cass County, and shall be entitled to five senators and ten representatives;

22. The twenty-second legislative district shall consist of all of Cass County except those portions contained in the twentieth and twenty-first legislative districts, and shall be entitled to one senator and two representatives;

23. The twenty-third legislative district shall consist of Griggs and Steele Counties and all of Barnes County except that portion contained in the twenty-fourth legislative district, and shall be entitled to one senator and two representatives;

24. The twenty-fourth legislative district shall consist of Oriska, Alta, Hobart, Springvale, Cuba, Marsh, Green, Hemen, Mansfield, Binghampton, Norma, Nelson, Skandia, Svea, Meadow Lake, Raritan, Thordenskjold, Oakhill, Rosebud, Spring Creek and Greenland Townships and Township 140-58 in Barnes County, and shall be entitled to one senator and two representatives;

25. The twenty-fifth legislative district shall consist of Eagle, Walcott, Colfax, Abercrombie, Nansen, Dwight, Ibsen, Antelope, Center, Mooreton, Barney, Summit, Brandenburg, Bel-

ford, Fairmount, DeVillo, Waldo, LaMars and Greendale Townships in Richland County, and shall be entitled to one senator and two representatives;

26. The twenty-sixth legislative district shall consist of Dickey and Sargent Counties, and shall be entitled to one senator and two representatives;

27. The twenty-seventh legislative district shall consist of Ransom County and all of Richland County except that portion contained in the twenty-fifth legislative district, and shall be entitled to one senator and two representatives;

28. The twenty-eighth legislative district shall consist of LaMoure and Logan Counties, and shall be entitled to one senator and two representatives;

29. The twenty-ninth legislative district shall consist of Stutsman County and shall be entitled to two senators and four representatives;

30. The thirtieth legislative district shall consist of Emmons and McIntosh Counties, and shall be entitled to one senator and two representatives;

31. The thirty-first legislative district shall consist of Kidder and Sheridan Counties and all of Burleigh County except that portion contained in the thirty-second legislative district, and shall be entitled to one senator and two representatives;

32. The thirty-second legislative district shall consist of the City of Bismarck and the unorganized territory designated as Hay Creek, Lincoln and Fort Rice precincts (Townships 137-80, 138-80, 139-80 and 139-81) in Burleigh County, and shall be entitled to three senators and six representatives;

33. The thirty-third legislative district shall consist of Mercer and Oliver Counties and all of Morton County except those portions contained in the thirty-fourth and thirty-fifth legislative

districts, and shall be entitled to one senator and two representatives;

34. The thirty-fourth legislative district shall consist of the City of Mandan and the unorganized territory designated as Crown Butte, Bindewald, Custer and Highland precincts (Townships 138-80, 138-81, 138-82, 139-81, 139-82, 140-81, 140-82, and 140-83) in Morton County, and shall be entitled to one senator and two representatives;

35. The thirty-fifth legislative district shall consist of Grant and Sioux Counties, and Harmon Township and the unorganized territory designated as Wenger, Rural, Sweetbriar, Dettman, Albrecht, Columbia, Sims, Doll, Olin, Faust, Hermes, Buchli, Huff, Little Hearth, Fallon, Stone, Fort Rice, Odense, and New Hope precincts (Townships 133-82, 134-79, 134-80, 134-81, 134-82, 134-84, 135-79 through 84, 136-79 through 84, 137-79 through 87, 138-83 through 90, 139-83, and 139-84) in Morton County, and shall be entitled to one senator and two representatives;

36. The thirty-sixth legislative district shall consist of Dunn and McKenzie Counties, and shall be entitled to one senator and two representatives;

37. The thirty-seventh legislative district shall consist of the City of Dickinson in Stark County, and shall be entitled to one senator and two representatives;

38. The thirty-eighth legislative district shall consist of Adams and Hettinger Counties and all of Stark County except those portions contained in the thirty-seventh and thirty-ninth legislative districts and shall be entitled to one senator and two representatives; and

39. The thirty-ninth legislative district shall consist of Slope, Billings, Bowman, and Golden Valley Counties and South Heart, Slope and Ash Coulee Townships and Townships 137-96.

137-97, 137-98, 137-99, 138-96, 138-97, 138-98, 138-99, 139-96, 139-99, 140-96, 140-98, and 140-99 in Stark County, and shall be entitled to one senator and two representatives.

Civil No. 4664. Daniel Chapman and Jacque Stockman, Plaintiffs, v. Ben Meier, Secretary of State for the State of North Dakota, Defendant.

Bright, Circuit Judge, dissenting.

I respectfully dissent.

Today, a reconstituted majority of this court permanently adopts the stop-gap apportionment scheme for North Dakota's State Legislative Assembly known as the Dobson Plan, in the face of our earlier order[1] which stated:

> We approve the Dobson Plan of reapportionment at this time for the 1972 election only. This court retains jurisdiction of this cause for the purpose of adopting a different plan of reapportionment which will not be hampered by considerations of impending elections. [**Chapman v. Meier** (D. N.D., filed June 30, 1972) at 6.]

My colleagues have thus wordlessly brushed past the doctrine of the "law of the case,"[2] changed completely the course of our previous decisions, and, without further hearing of any kind, placed into effect a legally flawed plan whose overriding virtue at the time of its "temporary" adoption in 1972 was that it would cause minimum disruption in the then-pending

---

[1] **Chapman v. Meier,** Civil No. 4664 (D. N.D., filed June 30, 1972).

[2] Although this doctrine "merely expresses the practice of courts * * * not a limit to their power," **Messenger v. Anderson,** 225 U.S. 436, 444 (1912) (Holmes, J.), the Eighth Circuit has recognized it to be "a salutary rule of practice" and stated that a former decision in the same case would not be reversed unless the court were convinced that the former decision was "clearly erroneous and that it

elections and yet reduce substantially the existing inequality between legislative districts under the "one-man, one-vote" standard.

In our order filed June 30, 1972, we stated:

> We recognize certain weaknesses in the Dobson Plan, namely, (1) some variance in population among the legislative districts, which, in a few instances, seems substantial; (2) an increase in the size of the legislature, notwithstanding that the state has lost population over the past decade; and (3) a continuation of multi-member legislative districts. [**Chapman v. Meier,** *supra* at 3.]

Simply stated, in adopting this plan today, the majority has not followed the supervisory admonition of the Supreme Court, contained in **Connor v. Johnson,** 402 U.S. 690 (1971), and reaffirmed in **Mahan v. Howell,** 410 U.S. 315 (1973), disapproving the use of multi-member districts in court-fashioned plans. Nor has the majority adhered to the equal protection standard for permissible population variances between districts,

---

works a manifest injustice." **Kempe v. United States,** 160 F.2d 406, 408 (8th Cir.), **cert. denied,** 331 U.S. 843 (1947); **Emery v. Northern Pacific Railroad Company,** 407 F.2d 109, 112 (8th Cir. 1969).

A similar version of the doctrine applies in the Court of Claims, which stated:

> Where substantially similar questions have been determined in prior litigation, including a prior proceeding in the same case, the court will not consider such arguments unless there are compelling circumstances that require review of prior holdings. Considerations of judicial economy and orderly disposition of the issues render it desirable that both parties proceed directly to the issues yet undecided and forgo a purposeless and time-consuming rehashing of cold matters.

Trans Ocean Van Service v. United States, 470 F.2d 604, 620, n. 3 (Ct.Cl. 1973).

District courts too are subject to the rule, and it has been said:

> Under the doctrine known as the law of the case, the unreversed decision of a question of law or fact made during the course of litigation settles that question for all subsequent

enunciated in **Mahan,** *supra*; **Gaffney v. Cummings,** 93 S.Ct. 2321 (1973); and **White v. Regester,** 93 S.Ct. 2332 (1973).

My colleagues argue that we must not "intrude on the political realm" by eliminating multi-member districts, nor should we "sift and shuffle abstract figures" to achieve smaller deviations between districts. These arguments, I fear, miss the point. The former ignores the political consequences of simply perserving the status quo, while the latter substitutes convenience for the Constitution.

I agree with my colleagues that we must decide this case outside the "political realm," but the assumption of the majority that doing nothing with the existing plan is not doing something represents a "head-in-the-sand" viewpoint. Either doing something or doing nothing may have political consequences, but we, of course, must close our eyes to those consequences. Our decision must be based upon application of proper legal and constitutional principles.

The path to a proper resolution of the substantive issues in this case lies in understanding the nature of the decision that we are called upon to make. Unlike so many courts, we are not confronted with a challenge to an apportionment scheme duly enacted by a state legislature, where the threshold question is whether a constitutional violation exists to justify federal

---

stages of the suit. Orderly and consistent progress of the case requires that the parties be precluded, with rare exceptions, from re-opening and re-arguing matters already decided. [**United States v. Swift & Company,** 189 F. Supp. 885, 902 (N.D. Ill. 1960) (citations omitted), **aff'd,** 367 U.S. 909 (1961).] **Accord Barrett v. Baylor,** 457 F.2d 119, 123 (7th Cir. 1972).

The question of the inappropriateness of the Dobson Plan as a permanent solution to North Dakota's reapportionment woes has already been settled by our order of June 30, 1972. To reverse our publicly stated view of this matter—without some new circumstances compelling that change—thus violates the sound judicial principles underlying the doctrine of the "law of the case" and seriously undercuts the stability of our decision-making process.

court intervention. We are well past that point in this litigation. The invalidity of the existing apportionment scheme was adjudicated in our order of May 22, 1972. What remained, following our temporary adoption of the Dobson Plan on June 30, 1972, was a final exercise of our equity power to fashion a more permanent remedy in the form of a new apportionment plan.

The general question now before us is this: what are the obligations and restrictions on the discretion of a federal district court in the exercise of this equity power? In particular, we search for an answer to these two specific questions:

> 1) Must the court replace multi-member districts with single-member districts where the former were never established as a matter of state policy, but were originally adopted as an expedient in a previous court-fashioned plan?
>
> 2) How close to absolute equality must the court come in re-drawing district lines in the absence of clearly controlling state apportionment policy?

Before suggesting my answers to these two points, I think that a detailed review of the history of reapportionment in North Dakota is useful.

I

History shows that the North Dakota Legislature reapportioned itself infrequently and not too well. Mr. Richard Dobson, political editor of the Minot Daily News and drafter of the Dobson Plan here in question, has described the situation in these words:

> In eight decades of statehood, the reapportionment problem has never been dealt with satisfactorily. Much of the time the legislature simply tried to ignore the problem. When action was taken, it was usually designed to preserve the *status quo* and safeguard incumbent legislators.

[Dobson, **Reapportionment Problems,** 48 N.D. L.Rev. 281 (1972).]

Importantly, there has been no valid, new apportionment scheme placed into effect by the legislature since 1931. Variances between districts, which existed even then, swelled with population shifts over the intervening years. For example, Renville County had 7,263 inhabitants in 1930, while the City of Fargo had 28,619. 30 years later, the 43rd District (Renville County) had shrunk to 4,698 while the 9th District (Fargo) had expanded to 46,857. **See** Dobson, *supra* at 285.

In 1961, a state reapportionment commission—created by a 1960 amendment to the North Dakota Constitution—sought to re-draw the districts, but produced a plan clearly favoring the rural areas in representation.[3] An initial court challenge was rejected by the state supreme court on a minor procedural point. **State ex rel. Aamoth v. Sathre,** 110 N.W.2d 228 (N.D. 1961). The plaintiffs then turned to the federal district court which abstained, pending further action by the state supreme court. **Lein v. Sathre,** 201 F. Supp. 535 (D. N.D. 1962) (Davies, J., dissenting). Accepting jurisdiction, the state supreme court invalidated the commission plan based on state constitutional law principles. **State ex rel. Lein v. Sathre,** 113 N.W.2d 679 (N.D. 1962).

Following the United States Supreme Court's historic decision in **Baker v. Carr,** 369 U.S. 186 (1962), the plaintiffs returned to federal district court, but were again rebuffed. The court denied injunctive relief on the ground that there was no showing that the state legislature would not heed the state constitution's mandate to redistrict. **Lein v. Sathre,** 205 F. Supp. 536 (D. N.D. 1962) (Davies, J., dissenting).

---

[3] **See** Dobson, **Reapportionment Problems,** 48 N.D. L.Rev. 281, 285 (1972).

Rural interests in the legislature, however, pushed through a reapportionment scheme in the 1963 Session which comported with no known version of the "one-man, one-vote" principle. **See Dobson,** *supra* at 286. Based upon the then-newly-decided case of **Reynolds v. Sims,** 377 U.S. 533 (1964), the federal district court invalidated that scheme as well as those portions of the state constitutional provisions relating to apportionment (sections 26, 29, and 35) amended in 1960. The court, however, refused to take further action until the legislature was given an adequate opportunity to reapportion itself within the **Reynolds v. Sims** guidelines. **Paulson v. Meier,** 232 F. Supp. 183 (D. N.D. 1964) (Davies, J., dissenting in part) [hereinafter **Paulson I**].

A compromise legislative plan, enacted on the final day of the 1965 Session, became law without the signature of the governor, but made little improvement over the invalidated 1963 version. This plan was promptly nullified by the federal district court which then ordered into effect its own plan. **Paulson v. Meier,** 246 F. Supp. 36 (D. N.D. 1965) [hereinafter **Paulson II**]. In a radical departure from state precedent, the court included in its plan five predominantly urban, multi-member senate districts, thereby creating the problem which is at the heart of the present dispute. This court-fashioned plan remained in effect until voided by our order of May 22, 1972, in the instant action.

Early in 1971, following some inconclusive grappling with the politically hot issue of multi-member districts by the legislature,[4] a suit was brought in state court challenging the dis-

---

[4] Republican legislators from the five urban districts, which elected from two-to-four senators each, wanted to retain the feature of at-large elections to these districts; but the Democrats wanted to subdivide those districts. Some rural Republican lawmakers also opposed multi-senator districting, contending that it gave urban residents an undue advantage. [*Id.* at 287.]

tricts on state constitutional grounds. The North Dakota Supreme Court ruled that that portion of section 29, which since statehood had required single-member senate districts, had been necessarily invalidated along with the other constitutional provisions relating to reapportionment in **Paulson I,** and dismissed the suit. **State ex rel. Stockman v. Anderson,** 184 N.W.2d 53 (N.D. 1971).

This action was commenced in November 1971. Plaintiffs alleged that population changes reflected in the 1970 Census had altered the urban-rural balance and that the court-fashioned plan of 1965 no longer provided representation in the legislature complying with the Equal Protection Clause of the fourteenth amendment. They further alleged that, since the legislature had failed to reapportion itself in 1971, the court was required to do so.

A three-judge district court was not requested by plaintiffs until they filed an amended complaint on May 8, 1972.[5] This

---

[5] Although the record in this court does not indicate any reasons for delay in processing the action, we take judicial notice that North Dakota was undertaking the drafting of a new constitution and that a Constitutional Convention consisting of delegates representing the people of North Dakota were considering proposals to provide for reapportionment by a commission. **See** Petitioner's Application for Stay to United States Supreme Court at 3-4 (dated July 11, 1972). **Chapman v. Meier,** Civ. No. 4664 (D. N.D.).

The Constitutional Convention adopted the following proposal as a reapportionment method for a *bicameral* legislature:

> Section 5, Reapportionment.
>
> A legislature reapportionment commission, consisting of electors appointed by the district judges in a number and manner as shall be established by the district judges, shall fix the number of senators and representatives and divide the state into as many senatorial districts of compact and contiguous territory as there are senators. The commission shall guarantee, as nearly as practicable, that every voter is equal to every other voter in the state in the casting of ballots for legislative candidates. One senator and at least two representatives shall be apportioned to each senatorial district and be elected at large

panel, therefore, faced a time pressure in hearing the case and awarding relief, if appropriate, before the then-impending 1972 primary and general elections. We were acutely aware that making substantial changes in legislative district boundaries might lead to great confusion and disruption in the conduct of the elections and the operations of the political parties in North

---

or from subdistricts thereof. The commission may combine two senatorial districts and provide for the election of senators at large and representatives at large or from subdistricts thereof.

The commission shall prescribe its own procedures. Upon agreement by a majority of its members, the commission shall file its reapportionment plan with the secretary of state, and it shall become effective sixty days after the date of filing; provided, the supreme court, in the exercise of original jurisdiction, may review any plan adopted by the commission. If the plan fails to meet state or federal constitutional requirements, the court shall direct the commission to revise the plan within a stated time.

Commission members shall be appointed following adoption of this constitution and immediately following the 1980 general election and every ten years thereafter. No member of the legislative assembly shall be eligible, during his term of office, for appointment to the commission. Commission members shall serve until each reapportionment plan becomes finally effective, and shall be compensated as provided by law. Vacancies shall be filled in the same manner as for original appointment. [Article IV, § 5 (Alternate Proposition 1A), Final Draft of the Constitutional Convention as presented February 17, 1972, to the Plenary Session, Daily Journal of the Constitutional Convention, at 540.]

As an alternative if the people adopted a *unicameral* form of legislature, the proposed reapportionment section stated:

Section 5. Reapportionment.

A legislative reapportionment commission, consisting of electors appointed by the district judges in a number and manner as shall be established by the district judges, shall fix the number of legislators and divide the state into legislative districts of compact and contiguous territory. No district shall elect more than four legislators, and the commission shall guarantee, as nearly as practicable, that every voter is equal to every other voter in the state in the casting of ballots for legislative candidates.

The commission shall prescribe its own procedures. Upon agreement by a majority of its members, the commission shall

Dakota, which are required to organize and operate on the basis of legislative districts. N.D. Cent. Code § 16-17-01 *et seq.* (Supp. 1971).[6]

This court, nevertheless, determined that our obligations as judges required us to undertake immediate consideration of positive action. After hearing the case on May 18, 1972, we acted on the merits four days later, declaring:

---

file its reapportionment plan with the secretary of state, and it shall become effective sixty days after the date of filing; provided, the supreme court, in the exercise of original jurisdiction, may review any plan adopted by the commission. If the plan fails to meet state or federal constitutional requirements, the court shall direct the commission to revise the plan within a stated time.

Commission members shall be appointed following adoption of this constitution and immediately following the 1980 general election and every ten years thereafter. No member of the legislative assembly shall be eligible, during his term of office, for appointment to the commission. Commission members shall serve until each reapportionment plan becomes finally effective, and shall be compensated as provided by law. Vacancies shall be filled in the same manner as for original appointment. [Article IV, § 5 (Alternate Proposition 1B), *id.* at 543.]

The voters of North Dakota on April 28, 1972, rejected the constitution and the North Dakota reapportionment again fell into the laps of federal judges.

[6] The Chairman of the North Dakota Republican State Committee for example, stated that his party had already commenced processes leading to the selection of delegates to state and national party conventions and that local party districts were in the process of endorsing legislative candidates. He concluded that:

> If the court indicates a new apportionment will be undertaken before the 1972 elections the entire political structure will be suspended in confusion until the new district lines are determined. When the determination is made the entire process will have to be begun again and there will not be time to accomplish the necessary procedures required by the parties in an election year.

Affidavit of Jack Huss in Support of Defendant's Answer to Amended Complaint (filed May 18, 1972), **Chapman v. Meier,** Civil No. 4664 (D. N.D.).

> The plaintiffs have made a legally sufficient showing that the existing legislative apportionment scheme in the State of North Dakota fails to meet Federal Constitutional standards. [**Chapman v. Meier,** Civ. No. 4664 (D. N.D., filed May 22, 1972) at 1.]

We further said that we would attempt promptly to reapportion the state in conformity with federal constitutional standards and in time for the 1972 elections. To aid us in this task, we appointed three Special Masters.[7] Exhibiting our real concern for avoiding disruption to the political processes on the eve of the 1972 elections, we set out specific guidelines for the Masters.[8] On June 20-21, 1972, we met with the Masters to consider eight alternate plans of reapportionment.

In our memorandum opinion and order filed June 30, 1972, we settled on a slightly amended version of a plan drafted by Master Dobson, now called the Dobson Plan, as an appropriate means of affording interim relief to the citizens of North Dakota from malapportionment.[9] This relief was tailored to the exigencies of the pre-election situation and geared to minimizing disruption in the political and electoral processes.[10]

---

[7] Mr. Richard Dobson of Minot; Mr. Thomas K. Ostenson of Fargo; and Mr. R. R. Smith of Grand Forks. We regret to note that Mr. Smith has since passed away, after serving our court well on this and other occasions.

[8] See opinion of Judge Benson, *supra* at pp. A-11–A-12.

[9] Judge Benson, concurring in but not signing the order, stated in a separate opinion that he would not limit the plan to the 1972 election.

[10] Among other things, we said:

> The plan substantially reduces the disproportionate representation which would result from elections under the existing apportionment of North Dakota. At the same time, the Dobson Plan causes a minimum disruption in the election processes for the 1972 primary and general elections. * * * To avoid major change in the present legislative district boundaries, the Dobson Plan provides for an increase in the size of the legislature. In this way, the number of inhabitants attributable to each sen-

In their amended complaint, plaintiffs had asked that we provide for single-member districts in any reapportionment plan adopted by the court. In our opinion we recognized the validity of plaintiffs' request, but did not grant relief at that time in order to avoid "extreme disruption in the elective processes.[11] However, we directed the Masters to give additional study to reap-

---

ator for equal representation is reduced to a figure compatible with the present populations of the rural districts, thereby avoiding the substantial remapping of these districts which would have been necessary if the number of senators had been kept at 49. [**Chapman v. Meier,** Civil No. 4664 (D. N.D., filed June 30, 1972) at 3.]

In the odd-numbered districts which had elected senators for a four-year term in 1970, we took the following steps to minimize disruption. Since we made substantial changes in only four legislative districts having such "holdover" senators, we required new elections in those districts, but otherwise permitted all other "holdover" senators to serve out their terms. We permitted certain metropolitan districts to conduct elections only to fill vacancies attributable to any additional seats given them in the new plan.

As to even-numbered districts, we noted:

> No serious problems for the 1972 elections seem likely to arise from proposed changes in the boundaries of several **even-numbered** districts under the Dobson Plan since the terms of senators last elected from all even-numbered districts will expire this year. In each even-numbered district, as changed by the Dobson Plan, the electors in 1972 will select a senator or senators as well as house members to represent them during the next legislative session. [*Id.* at 5-6.]

[11] We said in this regard:

> We briefly comment on the continuation of the five multi-member senatorial districts in which are located the cities of Fargo, Grand Forks, Minot, Bismarck, and Jamestown. In the most populous 21st district, encompassing the Fargo area, voters may be called upon to elect fifteen members of the legislative assembly to represent that district, five to serve in the Senate and ten to serve in the House of Representatives. In each of the other multi-member districts, the electors may also be called upon to elect a substantial number of representatives at a single election. If each of the major political parties endorses a full slate of candidates, the electorate in the largest multi-member district could be called upon to judge the qualifications of at least thirty candidates for state legislative office. In such circumstances, the task confronting a voter in making

portionment[12] and to submit an additional report. We recognized the public's interest in the court's proceedings by making arrangements for "interested persons" other than the named parties to express their views.

Our order filed June 30, 1972, should have been the prelude to a final determination of the reapportionment controversy for the decade of the 1970's. But this panel, much like the earlier panel in **Paulson I,** paid great heed to the request of the State of

---

a considered choice among individual candidates would appear to be most formidable.

The five multi-member legislative districts were created by the Federal District Court in **Paulson v. Meier,** 246 F. Supp. 36 (D. N.D. 1965), and not by enactment of the Legislative Assembly. In light of subsequent Supreme Court pronouncements, we believe it would be improper for this Court to permit their continuation in a court-fashioned plan. In **Connor v. Johnson,** 402 U.S. 690 (1971), the Court stated:

> * * * (W)hen districts court are asked to fashion apportionment plans, single-member districts are preferable to large multi-member districts as a general matter. *Id.* at 692.

The Supreme Court subsequently re-emphasized this ruling in **Connor v. Williams,** 404 U.S. 549, 551 (Jan. 24, 1972). We feel constrained to permit multi-member districts to continue during the 1972 elections, however, to avoid extreme disruptions in the elective processes. We recognize that political party organizational structure has been formed, for elections subsequent to the 1965 apportionment decision, along legislative district lines. **See generally** Ch. 16-17 NDCC. We recognize that it takes considerable time for members of a political party to organize and operate effectively for the benefit of the electorate, following a change in district boundaries. We think it inappropriate, therefore, to change the method of selecting the members of the legislative assembly in these multi-member districts at this late date in light of the confusion which such a change would likely precipitate. We feel that the electorate will be better served by minimizing the confusion surrounding the impending elections, than it would be by the abolition of multi-member districts at this eleventh hour. [*Id.* at 3-4.]

[12] We specifically requested the following:

The Special Masters should give additional consideration to creating legislative districts along the lines suggested in the Ostenson Plan, the boundaries of which should remain as compact

North Dakota to stay our hand to give the legislature another opportunity to "carry out its duties, responsibilities, and functions" to reapportion itself. **See** Brief in Support of Defendant's Motion for Stay (filed October 3-1972) at 4, **Chapman v. Meier,** Civil No. 4664 (D. N.D.). Attached to this motion was a copy of a letter from Representative Bryce Streibel, Chairman of the North Dakota Legislative Council,[13] creating a bipartisan Special Committee on Reapportionment, consisting of six legislators and five citizens, to study and to develop a reapportionment plan for submission to the legislature and "for use by [state and federal] courts in any judicial proceedings relating to reapportionment of the North Dakota legislature." **See** Attachment to the Brief in Support of Defendant's Motion for Stay (filed October 30, 1972), **Chapman v. Meier,** Civil No. 4664 (D. N.D.).

Subsequently, we granted a stay of the proceedings, observing that "no prejudice is likely to follow from this court's deferring further action on reapportionment until the 1973 legislature has had the opportunity to consider the reapportionment question." **Chapman v. Meier,** Civil No. 4664 (D. N.D., filed November 8, 1972) at 3). We further directed the Attorney General to file a report to this court regarding action taken by the legislature,

---

as possible while taking into account ease of travel within each district, as well as the substantial identity of economic and social interests among its inhabitants. The guiding principle of this study, of course, will be the requirements of equal representation mandated by the Fourteenth Amendment to the United States Constitution.

Additionally, the Masters are directed to modify the Ostenson Plan so as to eliminate the existing multi-member senate districts by creating senate districts or sub-districts each of which shall be represented by a single senator and two house members in the North Dakota Legislative Assembly. [*Id.* at 6.]

[13] The Legislative Council is a special body of the state legislature created to study matters of public interest and to recommend appropriate action by the legislature. The Council itself is composed entirely of legislators, but Council committees may include private citizens. N.D. Cent. Code § 54-35-01 *et seq.* (Supp. 1973).

and, retaining jurisdiction, we stated that our order was "without prejudice to the contentions made by the plaintiffs in these proceedings." *Id.* at 3-4.

The report, filed by the Attorney General on March 30, 1973, discloses that, with great diligence, efficiency, and promptness, the Committee formulated a reapportionment plan which on its face at least complied with constitutional standards and appeared to be free of partisanship. Legislative Council Chairman Streibel described the plan, introduced as House Bill 1042. in these words:

> House Bill No. 1042 leaves 32 county lines intact. It has the smallest deviation ratio of all the plans submitted to either the Court or the Committee. The deviation ratio is 1.04—1, which is determined by taking the high percentage of the mean population (District No. 18—12,599 per Senator—+2%) and dividing it by the low percentage of the mean population (District No. 22—12,150 per Senator—1.6%). House Bill No. 1042 calls for 50 Senators and 100 Representatives in 37 legislative districts.
>
> House Bill No. 1042 rigidly adheres to the one-man, one-vote requirement established by the Court. It maintains the "Communities of interest" philosophy to a great degree.
>
> Reapportionment is a legislative responsibility and not a job for the Courts. As elected representatives of the people, legislators can express the wishes of the voters regarding reapportionment better than appointed judges.
>
> House Bill No. 1042 was adopted unanimously by the Council's Reapportionment Committee. The plan meets all the Courts' tests for acceptability. It breaks fewer county lines than many plans submitted. It keeps legislative representation pretty much as it is. It does not

drastically reduce the number of legislators which would have had the effect of reducing rural representation. The rural voice of North Dakota is fading fast enough as it is without us hastening it.

The plan leaves in the current multi-senator districts. Subdistricting can be done at a later date if the legislature so desires. There just isn't enough census data from Grand Forks, Minot, or Bismarck to reapportion at this time on any basis other than multi-senator districts.[14]

In its journey through the legislature, however, House Bill 1042 underwent substantial alteration. District lines were redrawn. The legislature refused to amend the bill to provide for subdistricts in the larger cities. **See** Senate Journal, January 23, 1973, at 241, Supplementary Return (filed January 22, 1974), **Chapman v. Meier,** Civil No. 4664 (D. N.D.). The altered reapportionment proposal lost its bipartisan support. Where the original Committee version avoided consideration of partisan

---

[14] Statement by Rep. Bryce Streibel to Joint Senate and House Reapportionment Committee, January 3, 1973, Exhibit 3, Return to and Compliance with Order (filed March 30, 1973), **Chapman v. Meier,** Civil No. 4664 (D. N.D.).

The last sentence of Rep. Streibel's statement, however, does not reflect quite fully the actions of the Committee on the issue of multi-member districts. On several occasions during its deliberations, the Committee considered the elimination of such districts and, at one point, actually voted to do so. **See** Minutes of the Special Committee on Reapportionment, October 11-12, 1972, at 7, Supplementary Return (filed January 14, 1974), **Chapman v. Meier,** *supra.* After additional debate on this issue, however, the Committee reversed itself and decided to hold the matter in abeyance until an overall reapportionment plan, including multi-member districts, was formulated and adopted. **See** Minutes of the Special Committee on Reapportionment, November 8-9, 1972, at 9, Supplementary Return, *supra.*

No further votes on the specific matter of multi-member districts were taken by the Committee, and the following sentence appeared in the Committee's final report:

> The Committee also concluded that it had neither the time, nor the necessary data, to divide multi-member districts into single-member subdistricts in an accurate manner. [Report of the

politics,[15] the revised plan produced a volley of charges that the district lines were gerrymandered to protect incumbents. **See** Senate Journal, February 15, 1973, at 582-583, Exhibit 5, Return to and Compliance with Order (filed March 30, 1973), **Chapman v. Meier,** Civil No. 4664 (D. N.D.).

The bill in its altered form was vetoed by Governor Arthur A. Link on February 2, 1973, as "unfair," principally because of the failure of the legislature to create single-member senatorial districts. **See** Veto Message, Exhibit 1, Return to and Compliance with Order, *supra.*

In an atmosphere of politically partisan charges and countercharges, the legislature overrode the Governor's veto by a vote of 72 to 30 in the House and 37 to 14 in the Senate. **See** Exhibit 4, Return to and Compliance with Order, *supra.* Yet this reapportionment never became law: first, because under Section 67 of the North Dakota Constitution, it did not take effect until July 1st after the close of the session; and second, because, prior to July 1st, the effectiveness of the measure was stayed by the filing of a referendum petition signed by the requisite number of electors, pursuant to Section 25 of the North Dakota Constitution.

North Dakota Legislative Council at 137, Supplementary Return, *supra.*]

For a discussion of data which was made available to the Legislative Council Committee on which it might have subdivided multi-senator districts, if the Committee wished to do so, see text of this opinion, *infra* at n. 20.

[15] Gail Hernett, a state senator at the time and chairman of the Special Committee on Reapportionment, was asked by a member of the Joint Committee on Reapportionment of the legislature to comment on the 14 incumbents who would be required to run against each other under the Legislative Council plan. Chairman Hernett stated, according to the report of the meeting, that "he could not [comment] because he did not consider politics when drawing this up." Minutes of the Joint Committee on Reapportionment, Jan. 4, 1973, at 2, Exhibit 3, Return to and Compliance with Order (filed March 30, 1973), **Chapman v. Meier,** Civil No. 4664 (D. N.D.).

In addition, an initiated amendment to the North Dakota Constitution was proposed which would have created a bi-partisan commission composed of non-legislators to accomplish reapportionment and which specifically provided for single-member senate districts and single-member house subdistricts thereof. The requisite number of electors signed the initiative petition pursuant to Section 202 of the North Dakota Constitution.

Upon the motion of the plaintiffs, and after a hearing on the matter, we ordered a stay of proceedings in this action pending the outcome of the initiative and referendum elections. **Chapman v. Meier,** Civil No. 4664 (D. N.D., filed May 25, 1973).

The elections were held on December 4, 1973. House Bill 1042 was rejected by the voters by a vote of 50,729 to 44,363, while the constitutional amendment was defeated by a vote of 53,831 to 43,178. **See** Certificate of the Secretary of State, Attached to Defendant's Motion to Readopt Court-Fashioned Plan (filed December 26, 1973), **Chapman v. Meier,** Civil No. 4664 (D. N.D.). With the legislature's action thus nullified and the commission device rejected, the matter is once again before our court without any clearly controlling state reapportionment policies for our guidance.

Defendants have moved for an order readopting permanently our reapportionment plan filed June 30, 1972; plaintiffs resist and move for the adoption of a new plan consistent with our order of that date. Having more clearly defined the historical perspective of the instant action, I turn now to an examination of the legal issues.

II

The majority today directs that future elections for the state legislature in the major cities of North Dakota shall again be conducted on a multi-member district basis.[16] In continuing these districts, the court has exceeded the permissible bounds of its discretion. **See Connor v. Johnson,** 402 U.S. 690, 692 (1971).

We are not here concerned with a legislative adoption of such a reapportionment plan. The only plan ever enacted by the legislature containing the multi-member feature was House Bill 1042, which was defeated by the voters in a referendum election. If House Bill 1042 had withstood the voters' attack, the issue before us would be quite a different one and its resolution more evident. For, as the majority correctly points out, the cases clearly hold that the adoption of a multi-member scheme by a legislature does not constitute a *per se* violation of the Constitution. **See** Opinion of Judge Benson, *supra* at A-9. But the cases compel a different conclusion when a federal district court is called upon to exercise its discretion in fashioning a new apportionment plan.

The Supreme Court has repeatedly noted the objectionable features of multi-member districting.[17] In **Lucas v. Forty-**

---

[16] The 21st district including the cities of Fargo (population 53,365), West Fargo and Industrial Park (population 5,265), and some outlying areas of Cass County, embraces a total population of 60,242, and shall have five senators and ten representatives; the 5th District, Minot area and airbase (population 49,908), four senators and eight representatives; the 8th District, Grand Forks and airbase (population 51,243), four senators and eight representatives; the 32nd District, Bismarck area (population 35,596), three senators and six representatives; and finally, the 29th District, Statsman County including Jamestown (population 23,550), two senators and four representatives. Representatives from multiple-senate districts amount to 35 percent of the legislature. **See** Opinion of Judge Benson, *supra*.

[17] **See generally** Carpeneti, **Legislative Apportionment: Multi-member Districts and Fair Representation,** 120 U.Pa. L.Rev. 666 (1972).

Fourth General Assembly of Colorado, 377 U.S. 713 (1964), for example, the Court stated:

> One of the most undesirable features of the existing apportionment scheme was the requirement that, in counties given more than one seat in either or both of the houses of the General Assembly, all legislators must be elected at large from the county as a whole. Thus, under the existing plan, each Denver voter was required to vote for eight senators and 17 representatives. Ballots were long and cumbersome, and an intelligent choice among candidates for seats in the legislature was made quite difficult. No identifiable constituencies **within** the populous counties resulted, and the residents of those areas had no single member of the Senate or House elected specifically to represent them. Rather, each legislator elected from a multimember county represented the county as a whole. [377 U.S. at 731 (footnote omitted).]

Seven years later, in the key case of **Whitcomb v. Chavis,** 403 U.S. 124 (1971), while upholding a legislatively created multimember scheme against a head-on constitutional attack, the Court stated:

> We are not insensitive to the objections long voiced to multi-member district plans. Although not as prevalent as they were in our early history, they have been with us since colonial times and were much in evidence both before and after the adoption of the Fourteenth Amendment. Criticism is rooted in their winner-take-all aspects, their tendency to submerge minorities and to overrepresent the winning party as compared with the party's statewide electoral position, a general preference for legislatures reflecting community interests as closely as possible and disenchantment with political parties and elections as devices to settle policy differences between contending interests. The chance of winning or significantly influencing

> intraparty fights and issue-oriented elections has seemed to some inadequate protection to minorities, political, racial, or economic; rather, their voice, it is said, should also be heard in the legislative forum where public policy is finally fashioned. In our view, however, experience and insight have not yet demonstrated that multi-member districts are inherently invidious and violative of the Fourteenth Amendment. [403 U.S. at 157-160 (footnotes omitted).][18]

Thus, although multi-member districting does not amount to an Equal Protection violation, there are sufficient undesirable characteristics adhering to it to justify restricting its use in court-fashioned plans, absent special circumstances. This is precisely the rule which must control our decision in the case at bar, and it was enunciated by the Supreme Court under its supervisory power over federal courts in **Connor v. Johnson,** 402 U.S. 690 (1971).

The majority has unsuccessfully sought to distinguish away this controlling precedent by characterizing **Connor v. Johnson**

---

[18] The Court in **Whitcomb** also discussed the thesis, expounded by Professor Banzhaf in Banzhaf, **Multi-Member Electoral Districts —Do They Violate the "One Man, One Vote" Principle**, 75 Yale L.J. 1309 (1966), that residents in multi-member districts are overrepresented as a result of bloc-voting, but found no such showing in that case. 403 U.S. at 144-48.

Dick Dobson, author of the Dobson Plan, political editor of the Minot Daily News and a delegate to the North Dakota Constitutional Convention, does not favor the multi-senate district proposal which the majority adopts in its plan, for Dobson has said:

> It simply is not fair to allow a voter in an urban district to participate in the election of four senators while his neighbor in a rural district participates in the election of only one senator. It has been shown mathematically that multi-member electoral "systems contain inherent inequalities in representation." In decisions to date, the United States Supreme Court has not charted a clear path on this issue. Yet one fact is certain: Single-member districts are the essence of equal representation. [Dobson, **Reapportionment Problems,** 48 N.D. L.Rev. 281, 289 (1972).]

as a racial discrimination case. This is a misreading of the fact situation, for it is a straight population variance case.

On May 14, 1971, a three-judge district court in the Southern District of Mississippi invalidated the then-existing Mississippi legislative reapportionment statute, because of a total variance of 26 percent between the largest and smallest districts, and, on the eve of the forthcoming 1971 legislative elections, attempted to fashion an interim plan of reapportionment—much as this court was called upon to do in the instant case in June 1972. **Connor v. Johnson,** 330 F. Supp. 506 (S.D. Miss. 1971).

The district court's judgment was that single-member districting would be "ideal" for Hinds County, Mississippi, but that insufficient time remained before the candidate filing deadline, 17 days away, to perform the task of dividing this county into single-member districts. The three-judge court therefore issued a reapportionment plan calling for the at-large election of five senators and 12 representatives in Hinds County. Much like the action which we initially took in this case on June 29-30, 1972, that court promised to appoint a special master to investigate the possibility of single-member districts for the subsequent elections there in 1975 and 1977.

Plaintiffs promptly applied to the United States Supreme Court for a stay, requesting that the filing date for elections be postponed and that the district court provide single-member districts in Hinds County. The Supreme Court granted the application, stating:

> The district court is instructed, absent insurmountable difficulties, to devise and put into effect a single member district plan for Hinds County * * *. [402 U.S. at 692.]

The court laid down the following standard for district courts exercising discretion in fashioning apportionment plans:

> We agree that when district courts are forced to fashion apportionment plans, single-member districts are prefer-

> able to large multi-member districts as a general matter. [402 U.S. at 692.]

I am satisfied that this standard remains the law which governs our decision. In **Connor v. Williams,** 404 U.S. 549 (1972), decided after **Whitcomb v. Chavis,** *supra*, the Supreme Court reviewed another challenge to the district court's Mississippi reapportionment plan and reemphasized its holding in the earlier **Connor** case, stating:

> The District Court retained jurisdiction over these three counties and ordered that a Special Master be appointed in January 1972 to "take testimony and make findings as to whether the Counties of Hinds, Harrison, and Jackson may feasibly be divided into districts of substantially equal numbers in population for the elections of 1975 and 1979." 330 F. Supp. at 519. Such proceedings should go forward and be promptly concluded, for, as this Court has emphasized, "when district courts are forced to fashion apportionment plans, single-member districts are preferable to large multi-member districts as a general matter." **Connor v. Johnson,** 402 U.S. 690, 692 (1971). [404 U.S. at 551.]

Most recently, in **Mahan v. Howell,** 410 U.S. 315 (1973), the Court examined the state legislature's apportionment of Virginia which had been invalidated by a three-judge district court. Although the Supreme Court reversed the district court in adopting a new standard on permissible population variances in state plans, it did affirm the trial court's use of multi-member districts in reapportioning certain areas containing military personnel. Because of "unusual, if not unique, circumstances" involving severe time pressures, the Court permitted the multi-member plan to stand, but only on an interim basis. 410 U.S. at 331-332. In reaching this decision, the Court noted that:

> The [district] court conscientiously considered both the legislative policy and this court's admonition in **Connor**

> **v. Johnson,** *supra*, that in fashioning apportionment remedies, the use of single-member districts is preferred. But it was confronted with plausible evidence of substantial malapportionment with respect to military personnel * * * and the fear that too much delay would have seriously disrupted the fall 1971 elections. Facing as it did this singular combination of unique factors, we cannot say that the District Court abused its discretion in fashioning the interim remedy of combining the three districts into one multimember district. [410 U.S. at 333.]

Turning to the case at bar, it should be obvious that we are long past the "interim" remedy stage of **Mahan.** The conditions which justified the creation of multi-member senate districts in 1965 by the court in **Paulson II,** and which justified the temporary continuation of these districts by our court in 1972, have faded into history. I can find no valid state legislative policy nor any practical grounds at the present time justifying the use of multi-member senate districts in North Dakota. Thus, under the language of **Mahan** and the holdings in the two **Connor** cases, the continuance of multi-member senate districts constitutes an abuse of discretion by this court.

I have read the complete record in this case with care, and find no reasons advanced anywhere in that record for continuing multi-member senate districts as either furthering the art and science of politics or improving the conduct of state government. However, the record does disclose several arguments in favor of the more traditional single-member senate districts:

(1) It gives a voter a chance to compare only two candidates, head to head in making a choice.

(2) It prevents one political party with a heavy plurality in one or two potential districts from dominating other potential districts that might narrowly go for the candidate of the opposite party.

(3) It prevents a city wide political organization from ostracizing or disciplining a legislator, who dares stray from the machine's line.

(4) It permits a citizen to identify a legislator as his senator and makes direct communication easier.[19]

(5) It makes each senator responsible for his actions and makes it difficult for a senator to fade into the ranks of "the team" to avoid being identified with specific actions taken.

(6) It reduces campaign costs and "personalizes" a campaign.

(7) It creates greater interest in the possibility of a citizen seeking a legislative seat without the political machine blessing.

(8) It would diminish the animosity created in the legislature against multi-senate districts because of the tendency of senators elected by one political party from a city to vote as a bloc.

(9) It would tend to guarantee an individual point of view if all senators are not elected as a team.

(10) It would equalize the power of people in single senate districts with the people in the broken down multi-senate districts to **influence** the **election** of **only one** senator.

From North Dakota's earliest days, the policy of single-member senate districts was an integral part of its political

---

[19] For example, in the 21st District encompassing the cities of Fargo and West Fargo, four of the five senators live in the extreme south side of Fargo; only one resides in the northern section of Fargo. No state senator resides in West Fargo. I take judicial note of these facts and that, generally speaking, the most affluent citizens in the 21st Legislative District are concentrated on Fargo's south side. **See** Fargo Forum, January 29, 1974, at 9, c.1 (morning edition).

tradition. Section 29 of the Constitution of 1889 required such districts and controlled all elections in the state until it was invalidated as an almost accidental by-product of the federal district court's decision in **Paulson II. See State ex rel. Stockman v. Anderson,** 184 N.W.2d 53, 57-58 (N.D. 1971). When a panel of this court adopted with some hesitancy a truly unprecedented multi-member senate plan in **Paulson II,** the court said:

> We have exhaustively considered the plan as set forth in Senate Bill 39 [which we hereby adopt]. We find it not perfect. Five "multi-member" districts are created; county lines are violated in twelve instances. * * * Insofar as the multi-member districts are concerned, if experience proves that practical difficulties or inequities result therefrom, appropriate remedial legislation may reasonably be expected. [246 F. Supp. at 44.]

In the nine years since the court in **Paulson II** first introduced multi-member senate districts to North Dakota, they have been the subject of unceasing political, philosophical, and legal disputes.[20] Confronted with "practical difficulties or inequities" referred to in **Paulson II,** the legislature has been unable to resolve this bitterly divisive issue in a manner acceptable to the electorate. A court plan which has produced and continues to produce this kind of disruptive results ought not to be readopted. This, unfortunately, is exactly what the majority has done.

The evidence is at hand to permit the fashioning of a remedial plan which subdivides the multi-member senate districts in North Dakota's major cities. During the hearings of the Special Committee on Reapportionment, the late Mr. R. R. Smith, one of the court's Special Masters, advised the Committee that he had successfully formulated single-member districts

---

[20] **See** text of this opinion at notes 4-6, 14-15, *supra.*

for the cities of Bismarck, Grand Forks, and Minot. **See** Minutes of the Special Committee on Reapportionment, October 11-12, 1972, at 5, and November 8-9, 1972, at 5, Supplementary Return, *supra*. Mr. Ostenson, also one of our Special Masters, assured the Committee that:

> [I]t is not difficult to divide multi-member districts into single-member districts in Fargo and West Fargo, but in other cites it may be necessary to make ground surveys and estimate the population within enumeration districts. Mr. Ostenson said that if the Committee selects a reapportionment plan, it would not be terribly difficult to adopt single-member districts. [Minutes of the Special Committee on Reapportionment, Nov. 8-9, 1972, at 8, Supplementary Return, *supra*.]

Mr. Ostenson also assured this court that with present census data plus some added ground surveys, the existing multi-member senate districts may be subdivided into single-member senate districts. **See** Comments to Ostenson Plan, attached as Appendix B, **Chapman v. Meier,** Civil No. 4664 (D. N.D., filed June 30, 1972).

Given this information, the court should proceed to comply with the Supreme Court's admonition in **Connor v. Johnson,** *supra*, and establish single-member senate subdistricts within North Dakota's urban areas.

III

The Dobson Plan cannot stand as a permanent reapportionment plan for North Dakota for a second major reason: it contains unconstitutionally large population disparities between districts. The largest district (population 13,176) exceeds the size of the ideal district by 8.8 percent; the smallest (population 10,728) falls short of the ideal by 11.4 percent—a total deviation of more than 20 percent and a deviation ratio of 1.23-1.

See Chapman v. Meier, Civil No. 4664 (D. N.D., filed June 30, 1972), at 3 n.4.

In our original consideration of this case, the court fashioned interim relief based on the fact that the case came to us on the eve of the 1972 elections. We sought to avoid disruption of the impending elections and, with that consideration in mind, selected the Dobson Plan because it effected less change in the then-existing legislative lines compared to other plans.[21] It is now the time to reevaluate this plan's variances calmly in light of the Constitution and without these unusual circumstances, but the question is: what standards to apply?

In **Connor v. Williams,** 404 U.S. 549 (1972), a court-fashioned plan for Mississippi's state legislature—containing a total variance of 18.9 percent—was attacked as unconstitutional based on **Kirkpatrick v. Preisler,** 394 U.S. 526 (1969), and **Wells v. Rockefeller,** 394 U.S. 542 (1969). The Supreme Court, however, chose not to reach this issue, and instead vacated the district court's order pending completion of proceedings consistent with the Court's earlier mandate in **Connor v. Johnson,** 402 U.S. 690 (1971). Since that time, the Court has more clearly defined the Equal Protection standards applicable to population deviations in legislative redistricting plans enacted by state legislatures. **Mahan v. Howell,** 410 U.S. 315 (1973); **Gaffney v. Cummings,** 93 S.Ct. 2321 (1973); **White v. Regester,** 93 S.Ct. 2332 (1973). However, it remains an open question whether a more stringent standard, one of "absolute equality," applies to reapportionment schemes fashioned by federal district courts in the exercise of their equity power. But even assuming, *arguendo,* that **Mahan's** flexible standard controls court-fashioned plans as well as plans enacted by legislatures, it seems to me that the variances in the Dobson Plan are in all likelihood too great to pass constitutional muster, particularly since no

---

[21] **See** text of this opinion at note 10, *supra.*

justification is shown on the record for continuing the use of this plan.

The touchstone of the **Mahan** case is its reaffirmation of a statement from **Reynolds v. Sims,** 377 U.S. 533 (1964), that:

> So long as the divergences from a strict population standard are based on legitimate considerations incident to the effecutation of a rational state policy, some deviations from the equal-population principle are constitutionally permissible with respect to the apportionment of seats in either or both of the two houses of a bicameral state legislature. [377 U.S. at 579.]

Applying this flexible standard to the legislative reapportionment by the Virginia General Assembly, the Court upheld a 16.4 percent variation between the largest and smallest districts on the grounds that the deviation arose from a valid state policy of maintaining the integrity of political subdivision lines. Noting that the proper equal protection test is not framed in terms of "governmental necessity," but simply in terms of a claim that a state legislature may "rationally consider," 410 U.S. at 326, the Court concluded:

> Neither courts nor legislatures are furnished any specialized calipers that enable them to extract from the general language of the Equal Protection Clause of the Fourteenth Amendment the mathematical formula that establishes what range of percentage deviations is permissible, and what is not. The 16-odd percent maximum deviation that the District Court found to exist in the legislative plan for the reapportionment of the House is substantially less than the percentage deviations that have been found invalid in the previous decisions of this Court. While this percentage may well approach tolerable limits, we do not believe it exceeds them. Virginia has not sacrificed substantial equality to justifiable deviations. [410 U.S. at 329.]

Here, however, I cannot say that on the present record the Dobson Plan "has not sacrificed substantial equality to justifiable deviations." Not only does the Plan include a deviation greater than the 16.4 percent upheld in **Mahan,** but more importantly it is not justified by any rational state policy now in effect. It is clear for example that the State of North Dakota has not adopted, either by legislative action or otherwise, a firm policy of strictly adhering to political subdivision lines,[22] such as the Virginia policy found so important by the Supreme Court in **Mahan.** Absent some such policy to justify the large population deviation of the Dobson Plan, the Equal Protection Clause requires this court to adopt an apportionment plan with less variance between districts.[23]

---

[22] In **Paulson II,** a panel of this court determined that the 1965 legislature had retreated from the earlier policy of the State of North Dakota which accorded legislative representation on a county-wide basis. 246 F. Supp. at 42-43. Moreover, in oral argument on a motion for stay in the case at bar, counsel for defendant-Meier defended House Bill 1042 in its amended form as passed by the legislature, by stating:

> True, the Plan cuts through county lines, but that is not a criteria. There is no North Dakota constitutional provision which addresses itself to that. The one we had is, of course, no longer applicable. [Transcript of Proceedings, held May 25, 1973, **Chapman v. Meier,** Civil No. 4664 (D. N.D.), at 4-5.]

[23] The Dobson Plan was reviewed and rejected by the Special Committee on Reapportionment of the Legislative Council during its hearings. **See** Minutes of the Special Committee on Reapportionment, October 11-12, 1972, at 305, Supplementary Return (filed Jan. 14, 1974), **Chapman v. Meier,** Civil No. 4664 (D. N.D.). Ultimately, that Committee recommended a plan containing a total deviation of only 3.6 percent. **See** Report of the Special Committee on Reapportionment & Legislative Council Plan, Supplementary Return, *supra.*

IV

In dissenting, I believe that it behooves me to offer my suggestions for resolving the case before us, particularly since the Supreme Court may once again be called upon to review the decision of this court.[24]

On June 30, 1972, we expressed tentative approval for the Ostenson Plan. Since that time, the Special Committee on Reapportionment of the North Dakota Legislative Council has considered the Ostenson Plan, the Dobson Plan, and many others, and with staff assistance arrived at a different reapportionment plan which it recommended to the legislature. The information which it gathered and the work that it performed are available to us. See text of this opinion at note 13, *supra*. That plan, as noted, keeps population deviation to a minimum. It seems to me that we might follow the precedent of an earlier panel of this court which adopted a committee plan recommended to the 1965 North Dakota Legislature in **Paulson II**,[25]

---

[24] The defendant sought a stay of our June 30th order from the Supreme Court, urging that the 1973 elections be held under the prior 1965 court plan. Justice Blackmun denied the stay on July 17, 1972.

[25] The **Paulson II** court said, regarding the committee and the 1965 committee plan:

> For several months prior to the commencement of the next session of that Assembly (the Thirty-ninth), the Legislative Research Committee had been considering such proposed legislation. That Committee had engaged Mr. R. R. Smith, a qualified and experienced Certified Public Accountant and resident of this state, to prepare and submit a plan of legislative apportionment based as precisely as practicable upon population as revealed by the 1960 federal census, but bearing in mind certain appropriate guiding principles with emphasis upon maintaining the integrity of county boundaries, where possible. Such a plan was prepared and submitted to a subcommittee of the LRC; said subcommittee unanimously approved it. Public hearings were thereafter held in different cities of the state. The LRC was composed of nineteen members; nine were ex-

and give careful consideration to the plan presented to the 1973 North Dakota Legislature by this bipartisan citizens-legislators committee.

Since 1931, the legislature of this state has been unable successfully to reapportion itself, and that duty now rests in our court. In the exercise of this duty, our function is to devise the best plan possible in conformity with the Constitution and the supervisory guidelines provided by the Supreme Court. Single-member districts have proved advantageous in assuring the citizens of a district meaningful representation, while multi-member districts have been the subject of constant criticism by scholars, legislators, and courts. The Supreme Court recognized this in **Connor v. Johnson,** *supra*, and thus we are obligated to fashion an appropriate plan containing single-member senate districts in North Dakota's metropolitan areas.[26]

Apart from the necessity of subdividing these multi-member senate districts, lest I be misunderstood, I wish to make it clear that I am not saying that the Dobson Plan must be rejected out of hand by this court. Defendant-Meier should be given the opportunity to justify the Plan's continued existence upon a showing that it does indeed serve some rational state policy offsetting the population variances.

---

perienced and influential members of the legislature, ten were prominent citizens of the state who, by reason of their places of residence, fairly represented the various sections of the state. Each of the major political parties was represented. The plan, as approved by the subcommittee, was thereafter unanimously approved by the LRC and submitted to the Legislative Assembly for action, under the designation Senate Bill 39. Senate Bill 39 was adopted by the Senate but rejected by the House of Representatives. [246 F. Supp. at 44.]

[26] I contrast the result proposed by the majority in this case with that of the three-judge district court in **Beens v. Erdahl,** 349 F. Supp. 97 (D. Minn. 1972), which in reapportioning Minnesota's legislature transformed multi-member House districts into single-member seats and kept the total deviation under 4 percent.

Accordingly, I would set a hearing upon the motions now before us. Pending this hearing, I would direct the Masters.[27]

1) to study and report to the court concerning the merits of the Legislative Council Reapportionment Plan;

2) to submit proposals to us for subdividing the existing multi-member senate districts of the Dobson Plan in Bismarck, Fargo, Minot, Grand Forks, and Jamestown, and the comparable multi-member senate districts proposed in the Legislative Council's Plan; and

3) to make recommendations concerning the proper handling of the military population at Grand Forks and Minot airbases for reapportionment purposes.

---

[27] I would recommend the apportionment of Mr. Gail Hernett, a former state senator and the former Chairman of the Special Committee on Reapportionment, to replace the late Mr. R. R. Smith as a Special Master.

In the United States District Court
For the District of North Dakota
Southeastern Division

Daniel Chapman and Jacque Stockman,
Plaintiffs,
vs.
Ben Meier, Secretary of State for the State of North Dakota,
Defendant.
Civil No. 4664

Order

(Filed May 22, 1972)

Jurisdiction of this controversy rests in this Court by virtue of Title 28, Section 1331, 1343, and 2281 of the United States Code.

Following oral argument in Fargo, North Dakota, on May 18, 1972, before this District Court of Three Judges, we took this matter under advisement.

Having now considered those arguments, together with the pleadings, affidavits on file and other pertinent documents tendered, we find and conclude as follows:

1. The plaintiffs have made a legally sufficient showing that the existing legislative apportionment scheme in the State of North Dakota fails to meet Federal Constitutional standards.

2. This Court shall attempt to reapportion the legislative districts in the State of North Dakota so as to conform to Fed-

eral Constitutional standards, within such time as to be effective for the 1972 primary and general elections.

3. For the purpose of assisting the Court in this endeavor, we appoint Mr. R. R. Smith of Grand Forks, North Dakota; Mr. Richard Dobson of Minot, North Dakota, and Mr. Thomas K. Ostenson of Fargo, North Dakota, as Special Masters, to serve as a Commission under the supervision and direction of this Court. The Commission shall study, formulate and present to us, within thirty days from date hereof, an apportionment plan. In this regard, we offer the following guidelines:

a. The Commission shall try to conform new legislative districts to the existing districts.

b. The Commission shall not substantially change the size of the Leglislature.

c. Natural geographic barriers shall be observed.

d. Existing political subdivision lines should be observed, in so far as possible.

e. In the event the Commission should find that it is unnecessary to substantially alter any one or more of the legislative districts presently defined, then it must consider and make recommendations relative to whether or not the incumbent senator or senators, whose term does not expire at the end of this year, must nevertheless stand for election in 1972.

4. We have considered the matter of "multi-member" districts and conclude there is insufficient time prior to the 1972 elections to fully explore and resolve the issues involved. The matter of "multi-member" districts will be studied in depth by the Commission, and the results of that study be made available to us.

5. The burden of paying the necessary expenses incurred in this matter is a proper one to be borne by the State of North Dakota. It is therefore our request that the State of North Dakota, through its Emergency Commission or some other appropriate agency, make available to this Court the initial sum of Five Thousand Dollars ($5,000.00) for the purpose of carrying out the directives outlined herein, the expenditure of such funds to be made only upon our direction.

6. We direct Mr. Roger E. Persinger of Bismarck, North Dakota, an officer of this Court, to advise, assist, and direct the Commission in its work.

It Is So Ordered.

Dated at Fargo, North Dakota, this 22nd day of May, 1972.

/s/ MYRON H. BRIGHT
United States Circuit Judge

s/ PAUL BENSON
Chief Judge
United States District Court

s/ BRUCE M. VAN SICKLE
Judge
United States District Court

In the United States District Court
For the District of North Dakota
Southeastern Division

Daniel Chapman and Jacque Stockman,
Plaintiffs,

vs.

Ben Meier, Secretary of State for the State of North Dakota,
Defendant.

Civil No. 4664

Before the Honorable Myron H. Bright, Circuit Judge, Paul Benson, Chief District Judge, and Bruce M. Van Sickle, District Judge.

Memorandum Opinion and Order

(Dated June 30, 1972)

In this action the plaintiffs seek: 1) our declaration that the 1965 apportionment plan ordered by the Federal Court for the North Dakota State Legislature is no longer valid under the United States Constitution; 2) a permanent injunction restraining the defendant from administering the election laws of North Dakota under the existing 1965 apportionment plan; and 3) an order establishing a constitutionally valid apportionment plan for the North Dakota State Legislative Assembly based upon the 1970 federal decennial census, including a provision for single-member legislative districts.

Following the presentation of evidence and oral argument on May 18, 1972, we entered an order, dated May 22, 1972, in which we found, inter alia, that the plaintiffs have made a legally sufficient showing that the 1965 legislative apportionment plan for the State of North Dakota no longer meets Constitutional standards, in the light of the 1970 census statistics. We deter-

mined that we would reapportion the legislative districts in compliance with the requirements of the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution in time to be effective for the 1972 primary and general elections. We also appointed Mr. R. R. Smith of Grand Forks, Mr. Richard Dobson of Minot, and Mr. Thomas K. Ostenson of Fargo, all in North Dakota, to serve as Special Masters to assist the court in formulating and adopting an appropriate reapportionment plan.

Since the election machinery in North Dakota is about to be set in motion,[1] we have been particularly concerned over the short period of time yet remaining before candidates for legislative office must file under the statutes of North Dakota. We have been mindful of the fact that a material change in legislative districts in North Dakota, at this late date, could have a seriously disruptive effect upon the selection of legislative candidates for the primary election, as well as upon the conduct of the general election of state legislators. For this reason we included in our order of May 22 guidelines for the Masters in their preparation of reapportionment proposals. Consistent with those guidelines, we have also tailored our relief in this case so a 'o cause minimum interference with the procedures leading to the selection of members of the state legislature by means of 1972 elections.

The Masters met with us on June 20 and 21, and presented to us eight separate plans of reapportionment which they had either created themselves or had submitted to them by other interested persons. We have discussed and analyzed each of

---

[1] Section 16-04-04, NDCC, provides, inter alia, that every legislative candidate shall file a petition for office with the county auditor of the county in which he resides not more than sixty days nor less than forty days prior to a primary election. Section 16-04-01, NDCC, provides that the primary election be held on the first Tuesday in September of every year in which a general election occurs. Thus, the primary election in North Dakota this year will be held on Tuesday, September 5. Petitions for legislative offices must therefore be filed prior to July 27, 1972, and not before July 7, 1972.

these plans with the Masters in light of North Dakota population statistics of which we have taken judicial notice.

We find that since 1960 there has been a general population shift from rural to urban centers in North Dakota. In addition, in the decade between 1960 and 1970, as shown by the census, the state has decreased in population from 632,446 to 617,761. Finally, the United States Air Force personnel and related civilian personnel affiliated with the Minot and Grand Forks Air Force Bases, both of which have come into existence since 1960, have increased the population appreciably in the Minot and Grand Forks areas. These changes and shifts in population have created constitutionally impermissible variations in population among the existing legislative districts of North Dakota. For example, the most populous district, present District No. 19 (part Grand Forks County), shows a population of 21,102, while the least populous district, District No. 38 (Hettinger, part Adams, and part Stark counties), shows a population of 8,997, or a total deviation of 96 percent from equal senatorial representation.[2] Because the North Dakota Legislature has failed to reapportion itself, in order to correct inequality of representation, we are required to fashion a legislative apportionment plan which will tend to equalize the population in each of the legislative districts in order to comply with the "one-man, one-vote" concept embodied in the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution. See **Baker v. Carr,** 369 U.S. 186 (1962).

Mr. Richard Dobson has submitted a proposed reapportionment plan which, in its amended form, is filed with this order as Appendix "A". This amended plan, which we will refer to as the Dobson Plan, provides for a decrease in the number of

---

[2] With 49 senators in the present North Dakota legislature, and a 1970 total population of 617,761, each senator would represent 12,607 people for exact quality of representation. Under the 1965 plan of apportionment and in light of 1970 census figures, population deviations vary from 67% greater than the standard to 29% less than the standard, thus giving a total deviation of 96%.

legislative districts from thirty-nine to thirty-eight,[3] but an increase in the number of senators from forty-nine to fifty-one and the number of representatives from ninety-eight to one hundred two. The Dobson Plan takes into account the general population shifts in North Dakota, while maintaining the integrity of county boundaries except in ten counties and makes limited alterations in boundaries of existing legislative districts. The plan substantially reduces the disproportionate representation which would result from elections under the existing apportionment of North Dakota. At the same time, the Dobson Plan causes a minimum disruption in the election processes for the 1972 primary and general elections. The plan as amended recognizes that the interests of those persons residing on the Air Bases at Minot and Grand Forks are more closely aligned with urban rather than with rural interests, and, therefore, includes those populations within the nearby urban district. To avoid major change in the present legislative district boundaries, the Dobson Plan provides for an increase in the size of the legislature. In this way, the number of inhabitants attributable to each senator for equal representation is reduced to a figure compatible with the present populations of the rural districts, thereby avoiding the substantial remapping of these districts which would have been necessary if the number of senators had been kept at 49.[4]

---

[3] The Dobson Plan, while denominating the legislative districts one through thirty-nine, in fact represents only thirty-eight districts since the amended plan omits the use of number thirteen to represent any legislative district.

[4] The following statistical comparison is made between the 1965 court plan and the Dobson Plan:

	1965 Plan	Dobson Plan
Number of Districts	39	38
Number of Senators	49	51
Number of Representatives	98	102
County Lines Broken	13	10
Av. pop. per senator	12,907	12,113
Most populous district	14,214	13,176
Least populous district	11,339	10,728
Pct. deviation over average	10.1%	8.8%
Pct. deviation under average	12.1%	11.4%
Deviation ratio	1.25-1	1.23-1

We recognize certain weaknesses in the Dobson Plan, namely, (1) some variance in population among the legislative districts, which, in a few instances, seems substantial; (2) an increase in the size of the legislature, notwithstanding that the state has lost population over the past decade; and (3) a continuation of multi-member legislative districts.

We briefly comment on the continuation of the five multi-member senatorial districts in which are located the cities of Fargo, Grand Forks, Minot, Bismarck, and Jamestown. In the most populous 21st district, encompassing the Fargo area, voters may be called upon to elect fifteen members of the legislative assembly to represent that district, five to serve in the Senate and ten to serve in the House of Representatives. In each of the other multi-member districts, the electors may also be called upon to elect a substantial number of representatives at a single election. If each of the major political parties endorses a full slate of candidates, the electorate in the largest multi-member district could be called upon to judge the qualifications of at least thirty candidates for state legislative office. In such circumstances, the task confronting a voter in making a considered choice among individual candidates would appear to be most formidable.

The five multi-member legislative districts were created by the Federal District Court in **Paulson v. Meier,** 246 F. Supp. 36 (D.N.D. 1965), and not by enactment of the Legislative Assembly. In light of subsequent Supreme Court pronouncements, we believe it would be improper for this Court to permit their continuation in a court-fashioned plan. In **Connor v. Johnson,** 402 U.S. 690 (1971), the Court stated:

> * * * (W)hen district courts are asked to fashion apportionment plans, single-member districts are preferable to large multi-member districts as a general matter. *Id.* at 692.

The Supreme Court subsequently re-emphasized this ruling in **Connor v. Williams,** 404 U.S. 549, 551 (Jan. 24, 1972). We

feel constrained to permit multi-member districts to continue during the 1972 elections, however, to avoid extreme disruptions in the elective processes. We recognize that political party organizational structure has been formed, for elections subsequent to the 1965 apportionment decision, along legislative district lines. **See generally** Ch. 16-17 NDCC. We recognize that it takes considerable time for members of a political party to organize and operate effectively for the benefit of the electorate, following a change in district boundaries. We think it inappropriate, therefore, to change the method of selecting the members of the legislative assembly in these multi-member districts at this late date in light of the confusion which such a change would likely precipitate. We feel that the electorate will be better served by minimizing the confusion surrounding the impending elections, than it would be by the abolition of multi-member districts at this eleventh hour.

The Dobson Plan calls for an increase in representation in District No. 5 (Minot and vicinity and the Minot Air Force Base); In District 18 (Grand Forks city and vicinity and the Grand Forks Air Base); and in District 21 (Fargo and Southwest Fargo vicinities). Each of these districts is entitled to one additional senator and two additional representatives. In Districts 5 and 21, the electorate chose its senators for a four year term in 1970. To avoid any disruption in the election processes and the nature of the representation to which those districts are entitled, we direct only that the one additional senator and the two additional representatives shall be elected from each of these districts in 1972. The senators elected in 1970 from each of these odd numbered districts shall hold office for an additional two years, the period for which they were elected. The voters in District 18 (Grand Forks city and vicinity), an even numbered district, will, of course, be called upon in 1972 to choose all of their legislative representation, including the one additional senator and the two additional representatives provided for by the Dobson Plan.

Senators elected in 1970 in the remaining odd numbered districts would ordinarily be entitled to serve out a four year term. We have made substantial changes, however, in the composition of the former 3rd, 7th, 27th, and 31st legislative districts,[5] and we have eliminated any designation of a 13th legislative district, that district having been incorporated into other districts. Because of these changes, we direct that the senators presently serving these odd numbered legislative districts under the 1965 apportionment, namely the 3rd, 7th, 13th, 27th, and 31st districts, shall be entitled to hold their present offices only until December 1, 1972. See Section 41, N.D. Constitution, as amended. We order and direct, therefore, that in these senate districts numbered 3, 7 (omitting 13 for reasons previously stated), 27 and 31 there shall be an election of a state senator in 1972 to represent said districts as reconstituted under the Dobson Plan. The senators elected from these particular odd-numbered districts shall serve for two years only, their terms ending at the same time as the terms of present holdover senators from other odd numbered districts.

All other senators now serving in **odd-numbered** districts may continue to serve out their term of office since the districts which they represent have not been materially altered under the Dobson Plan. We perceive no valid reason, therefore, to hold another election in 1972 for state senator or senators in these districts.

No serious problems for the 1972 elections seem likely to arise from proposed changes in the boundaries of several **even-numbered** districts under the Dobson Plan since the terms of senators last elected from all even-numbered districts will expire this year. In each even-numbered district, as changed by the Dobson Plan, the electors in 1972 will select a senator or

---

[5] In 1970, Senator Christensen was elected from the third district, Senator Swedlund from the seventh district, Senator Doherty from the thirteenth district, Senator Just from the twenty-seventh district, and Senator Chesrown from the thirty-first district.

senators as well as house members to represent them during the next legislative session.

We approve the Dobson Plan of reapportionment at this time for the 1972 election only. This court retains jurisdiction of this cause for the purpose of adopting a different plan of reapportionment which will not be hampered by considerations of impending elections. We add a caveat regarding the candidates for state senate filing for a four-year term in the 1972 elections. In the event that we hereafter adopt a different plan of reapportionment which substantially changes the boundaries of legislative districts, it may be necessary to require that all state senators stand for election in 1974 as was the case in **Paulson v. Meier,** supra, at Page 52.

In our meetings and discussions of proposals for reapportionment, we have been favorably impressed with a plan proposed by Mr. Thomas K. Ostenson, one of the Masters. We refer to this plan as the Ostenson Plan and attach a copy to this order, for reference purposes, as Appendix "B". We direct the Special Masters to give the Ostenson Plan further study and to report their recommendations to the court. The Special Masters should give additional consideration to creating legislative districts along the lines suggested in the Ostenson Plan, the boundaries of which should remain as compact as possible while taking into account ease of travel within each district, as well as the substantial identity of economic and social interests among its inhabitants. The guiding principle of this study, of course, will be the requirements of equal representation mandated by the Fourteenth Amendment to the United States Constitution.

Additionally, the Masters are directed to modify the Ostenson Plan so as to eliminate the existing multi-member senate districts by creating senate districts or sub-districts each of which shall be represented by a single senator and two house members in the North Dakota Legislative Assembly.

We further direct the Masters to study the status of personnel assigned to the air bases near Grand Forks and Minot, and report pertinent statistical data relating to the number of persons on these bases, the usual length of residence of military and civilian personnel affiliated with them, the number of such persons claiming citizenship in North Dakota, as well as other data relating to their exercise of voting privileges in North Dakota elections.

We direct the Masters to file their report with this court at the earliest possible date, as parts thereof become completed. In any event, we request that the Masters submit a completed report on their work no later than November 10, 1972. The parties will be given until November 24, 1972, to file objections or to otherwise comment on the Masters' report. Interested persons may voice their views through counsel for each of the parties, John B. Kelley, P. O. Box 1389, Fargo, North Dakota, for the plaintiffs, or Mr. Paul M. Sand, Attorney General's Office, State Capitol, Bismarck, North Dakota, for the defendant. Interested persons may also request leave of the court to appear separately and be heard.

Accordingly, we adopt the Dobson Plan of reapportionment as set forth in Appendix A, and we order the defendant, Ben Meier, Secretary of State of the State of North Dakota, to supervise and conduct only the 1972 primary and general elections under the Dobson Plan in conformity with this opinion.

Each member of the court reserves the right to file a statement of individual views.

Dated at Fargo, North Dakota, this 29th day of June, 1972.

MYRON H. BRIGHT
Circuit Judge

BRUCE M. VAN SICKLE
District Judge

In the United States District Court
For the District of North Dakota
Southeastern Division

Daniel Chapman and Jacque Stockman,
Plaintiffs,
vs.
Ben Meier, Secretary of State for the State of North Dakota,
Defendant.
Cv. No. 4664.

For the reasons hereinafter set out, I have not signed the order of the Court in this case.

I concur in the adoption of the Dobson Plan. It appears to be the plan that inflicts the least disruption on the election procedures and follows most closely the guidelines which we included in our order of May 22, 1972. It is further my opinion that the Constitutional deficiencies which have arisen in the existing 1965 apportionment plan by reason of population shifts since 1960 are cured by the Dobson Plan, and I would not limit the plan to the 1972 elections. The majority of this Court refers to "weaknesses of the Dobson Plan", particularly the continuance of multi-member districts, and then cites the 21st District as an example. It is interesting to note that the Dobson Plan submitted to the Court provided for only four senators and eight representatives from the 21st District, but the Court eliminated Dobson Plan District 13 and made that district a part of District 21 in the amended Dobson Plan which it has adopted, thereby compounding the "weakness".

Multi-member districts have existed in North Dakota since 1965. The fact that multi-member districts were first created

by the Federal District Court has no significance in my opinion, because the North Dakota Legislature has seen fit to abolish multi-member districts. The Connors cases[1] relied on by the majority of this Court relate to a specific factual racial situation in Mississippi that is not applicable to North Dakota. Where there has been no showing that such districts in North Dakota operate to dilute or cancel the voting strength of racial or political groups, it would not be improper for this Court to permit their continuation. See **Whitcomb v. Davis,** 403 U.S. 124, 29 L.Ed. 363 (1971).

It may be the Ostenson Plan is desirable, but it is much more disruptive and goes beyond that which is needed to meet Constitutional standards. The desirability of the Ostenson Plan and the desirability of multiple member districts are questions for the Legislature and not for this Court. This Court should intrude into legislative matters only as far as is necessary to cure Constitutional deficiencies and no farther.

Dated this _____ day of June, 1972.

PAUL BENSON, Chief Judge
United States District Court

---

[1] Connor v. Johnson, 402 U.S. 690 (1971)
Connor v. Williams, 404 U.S. 549, 551 (Jan. 24, 1972)

In the United States District Court
For the District of North Dakota
Southeastern Division

Daniel Chapman and Jacque Stockman, Plaintiffs, vs. Ben Meier, Secretary of State for the State of North Dakota, Defendant.	Civil No. 4664.

Notice of Appeal to the United States Supreme Court

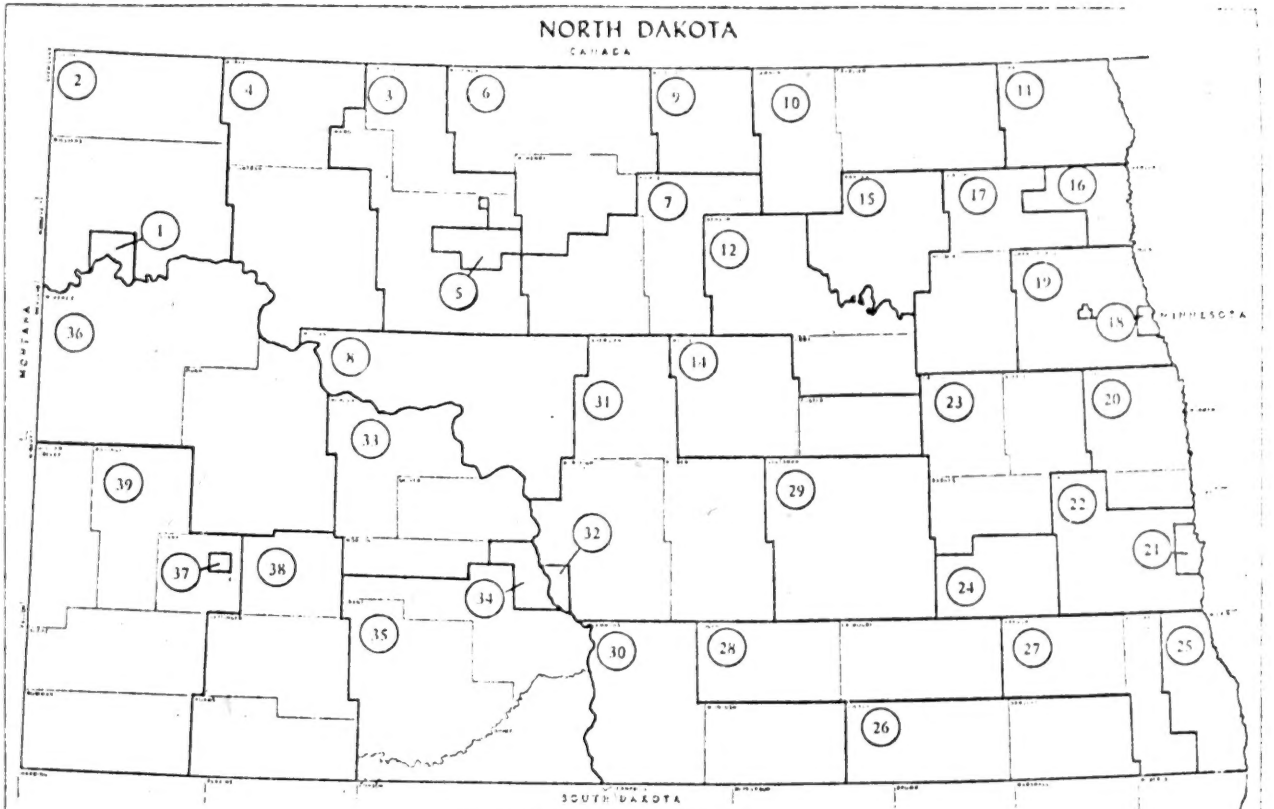
(Dated February 27, 1972)

Notice Is Hereby Given that Daniel Chapman and Jacque Stockman, plaintiffs above-named, hereby appeal to the Supreme Court of the United States from the Final Judgment and Order of a three-Judge District Court entered in this action on 30 January, 1974, which (1) adopts a permanent apportionment plan for the North Dakota Legislative Assembly, which plan (a) includes five (5) multi-member districts containing up to fifteen (15) members; (b) establishes permanent legislative districts with population disparities of more than twenty per cent (20%); and (2) denied the Motion by plaintiffs to adopt a permanent apportionment plan for the North Dakota Legislative Assembly in accordance with the Order of the Court dated 29 June, 1972.

This appeal is taken pursuant to 28 U.S.C., § 1253.

Dated this 27th day of February, 1974.

s JOHN D. KELLY
Post Office Box 1389
609½ First Avenue North
Fargo, North Dakota 58102
(701) 237-6983
Attorney for Plaintiffs.



LEGISLATIVE DISTRICTS

Legislative Districting Effective During the Forty-third Legislative Session

FILED
APR 11 1974
MICHAEL RODAK, JR., CLERK

In The

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1406

DANIEL CHAPMAN and JACQUE STOCKMAN,
Appellants,

vs.

BEN MEIER, Secretary of State for the
State of North Dakota,
Appellee.

MOTION TO AFFIRM

ALLEN I. OLSON
Attorney General
State of North Dakota
PAUL M. SAND
First Assistant Attorney General
State Capitol
Bismarck, North Dakota 58501
Attorneys for Appellee

E. L. MERDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, 421-2020

INDEX

Table of Cases II

Table of Statutes II

Jurisdiction 2

Questions Presented 2

Argument 3

Population Variance by the Districts 5

Conclusion 10

Appendix—

Order of Three-Judge Court dated May 22, 1972, Giving Guidelines to Special Masters A1

Report of Special Master Richard Dobson A3

Dobson Plan A7

Certification of Secretary of State Ben Meier pertaining to the constitutional measure and referral of House Bill 1042 (Chapter 411, 1973 Session Laws) A8

Constitutional Proposal A9

House Bill 1042 (Chapter 411, 1973 Session Laws) A11

Section 3 of House Bill 1042 ..... A17

Legislative Plan of House Bill 1042 ..... A18

Certification by Secretary of State on the votes cast for the constitutional measure and referred statute A22

Certification by the county auditor of Grand Forks on the votes cast at the Air Force Base A23

Certification by the county auditor of Ward County on votes cast in Minot Air Base A24

Table of Cases

Connor v. *Johnson*, 402 U.S. 690, 29 L. Ed. 2d 268 ..... 3, 5
Gaffney v. *Cummings*, ... U.S. ....., 37 L. Ed. 2d 298 .. 5, 8
Mahan v. *Howell*, 410 U.S. 315, 35 L. Ed. 2d 320 4
Minnesota State Senate v. *Beens*, 406 U.S. 187, 32 L. Ed. 2d 1 8
White v. *Regester*, 37 L. Ed. 2d 314, 412 U.S. 755 3

Table of Statutes

Article IV, Section 4, U.S. Constitution 9
House Bill 1042, Section 3 (Chapter 411, 1973 S.L.) 8
Section 27, North Dakota Constitution 3
28 U.S.C. 1253 2
28 U.S.C. 2281 2

In The

Supreme Court of the United States

OCTOBER TERM, 1973

No. _____

DANIEL CHAPMAN and JACQUE STOCKMAN,
Appellants,

vs.

BEN MEIER, Secretary of State for the
State of North Dakota,
Appellee.

MOTION TO AFFIRM

Pursuant to Rule 16, Paragraph 1 (c) of the Revised Rules of this Court, the Appellee, Ben Meier, Secretary of State for the State of North Dakota, moves that the Judgment of the District Court be affirmed on the ground that it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

JURISDICTION

Appellee agrees with the Appellants that this Court has jurisdiction to consider the appeal under 28 U.S.C. 1253. Legal logic dictates that an Order of a three-judge court, replacing and standing in lieu of a state law, has the same standing as the state law being replaced in applying the provisions of 28 U.S.C. 2281. It would be a paradoxical anomaly to construe the provisions of 28 U.S.C. 2281 in a manner so as to authorize a single District Judge to override or overrule a three-judge District Court.

QUESTIONS PRESENTED

The statement of the questions presented appearing in the jurisdictional statement fairly represents the issues. However, the issue or question can be more accurately restated as follows: The primary question involved here is whether or not the court-fashioned plan meets the U.S. constitutional requirements.

ARGUMENT

Aside from the implications in the *Connor* v. *Johnson* case, 402 U.S. 690, 29 L. Ed. 2d 268, we are not aware of any decision which states, in essence, that there should be distinction involving constitutional matters based upon which branch of government fashions or develops a reapportionment plan. As to single member districts and multi member districts, this Court in *White* v. *Regester*, 412 U.S. 755, 37 L. Ed. 2d 314 (June 1973), said:

> "Plainly under our cases, multi member districts are not per se unconstitutional, nor are they necessarily unconstitutional when used in combination with single member districts in other parts of the State."

In *Connor*, the Court said:

> "We agree that when district courts are forced to fashion reapportionment plans, single member districts are preferable to large multi member districts as a general matter."

This statement is qualified twice, once by the term "preferable" and again with the term "as a general matter". The District Court had a right to construe this as not being an absolute or definitive directive and that it was more in the nature of an advisory observation or a strong suggestion.

The District Court had a right to take into account that historically, multi member districts for the House of Representatives has been the standard of this state. Prior to 1965 (Paulson plan II) single senatorial districts on a county basis prevailed (see 27 N.D. Constitution), but that was under the "little federal system" which no longer meets constitutional requirements. Beginning with 1965,

this state has maintained multi member districts for both the House and Senate.

An initiated constitutional amendment was proposed to the electorate of this state which would have provided for single member districts. It was rejected by a vote of 53,831 No to 43,178 Yes in a Special Election held on December 4, 1973. The Court, in fashioning the plan under consideration, was justified by taking into account the practices heretofore followed in addition to the rejection of the single member districts in the constitutional amendment. The District Court could also take judicial notice of the general composition of the North Dakota population, its economic ties, and the interrelation with each portion of the state together with the fact that North Dakota is an agricultural state even though through and by subclassification areas can be designated as rural or urban. Nevertheless, agriculture is predominant. With minor exceptions, all businesses are dependent upon agriculture for their success. Being the state does not have any identifiable groups which are constitutionally recognizable, there appears to be no need to create single member districts.

Boundary lines for political subdivisions (counties) and units of government (cities) certainly are entitled to considerable weight and adequate consideration in the formation of legislative districts.

The referral and defeat of House Bill 1042, the legislative reapportionment plan, at the same election in which the constitutional measure was defeated, strongly suggests that the fragmentation and violations of county lines was the underlying reason for the defeat. If the Legislature would have had the benefit of *Mahan* v. *Howell*, 410 U.S. 315, 35 L. Ed. 2d 320, the plan most likely would have been different and so would the election results.

The North Dakota ballot is not designed for block voting. Each voter at the general election may cast a vote for any senator or representative regardless of party affiliation or nomination.

Single member districts, because of changes in population, will periodically require more substantial changes in the composition of legislative districts and will destroy voter identification with the district which will result in apathy, which can be ill afforded.

It would not appear proper for the courts to allow themselves to be used by individuals to accomplish political objectives, not constitutionally required, which have not been obtainable by the individuals through the political process. The present challenge was instituted on the heels of the announcement of *Connor* v. *Johnson*.

POPULATION VARIANCE BY THE DISTRICTS

Equal representation involves more than mere mathematics or a raw nose count. It involves tangibles and intangibles which are somewhat difficult to define with reasonable certainty or to assess a weight factor to each so as to permit them to be used universally and generally. Above all, it is more than mere population. The Supreme Court, in *Gaffney* v. *Cummings*, ... U.S. ....., 37 L. Ed. 2d 298 (June 1973) said:

> "What is more, it must be recognized that total population, even if absolutely accurate as to each district when taken, is nevertheless not a talismanic measure of the weight of a person's vote under the later adopted reapportionment plan."

The major "cities" in North Dakota have been growing in population more so than other areas. The growth

since 1970 probably was sufficient so that the variance may be constitutionally impermissible if mathematical equality were constitutionally required. It is a known fact that cities do not grow substantially in the same proportion in all directions. Dividing a city into single member districts would further accentuate the problem. The current multi member plan permits absorption of growth regardless of the direction. If there is a change in population, it would be allocated to the entire city under multi member districts rather than to the area involved if there were single member districts.

We must also be cognizant of the difficulty of attempting to maintain the geographic lines of political subdivisions and at the same time recognize population as a major factor in representation. The current plan has a variance of over-representation in District 11 amounting to 11.43 percent and an under-representation in District 4 equal to 8.71 percent which makes a total variation of 20.14 percent. However, percentages in themselves can be frightening. The actual population variance is not that great. The average under-represented equals 4.25 percent. The average over-represented equals 6.03 percent. Of the under-represented districts, 11 are above the average of 4.29 and 10 are below that average. Of the districts over-represented, the average is 6.03. Eight are above the average and nine are below the average.

The District Court, in the Order dated May 22, 1972, gave directions to the masters with the following guidelines:

A. The commission shall try to conform new legislative districts to the existing districts.

B. The commission shall not substantially change the size of the Legislature.

C. Natural geographic boundaries shall be observed.

D. Existing political subdivision lines should be observed insofar as possible.

E. In the event the commission should find that it is unnecessary to substantially alter any one or more of the legislative districts presently defined, then it must consider and make recommendations relative to whether or not the incumbent senator or senators, whose term does not expire at the end of this year, must nevertheless stand for election in 1972.

We must assume that the masters adhered to the guidelines announced by the Court. The Court adopted what is known as the Dobson plan. Mr. Richard R. Dobson submitted a memorandum to the Court in which he explains why the Plan submitted was constituted as submitted. See Appendix A3.

The explanation clearly shows that a reasonable effort was made to continue the boundaries of existing districts as closely as possible. The explanation also discloses that the Plan took into account natural geographic boundaries such as the Missouri River and arterial roads with the observation that it was not deemed necessary for a person to travel outside of one's district in going from one part of it to another. An effort was made to prevent violating existing county lines. The master reported that the greatest objection or complaints related to the breaking of county lines particularly in smaller rural counties. He stated "counties with very small populations should not be split because they are thereby rendered politically powerless. It is a form of de facto disenfranchisement." The master made the further observation with which we must agree that the deviation from the average popula-

tion per district decreases if many county lines are violated and increases if only a few county lines are split. This is the salient factor to be considered in this plan. Population variance can be narrowed at the expense of county lines. In a state with a small population as North Dakota, we should give equal, if not more consideration to the preservation of governmental political subdivisions, governing units, and county lines.

The size of the Legislature, the number of legislative districts, and the population in each district are factors to be considered. The larger the population in each district the more closely boundary lines of political subdivisions can be followed. The smaller the population of a district the greater the likelihood of artificial boundary lines or higher variance (this concept was recognized in Justice Stuart's dissenting opinion in *Minnesota State Senate* v. *Beens,* 406 U.S. 187, 32 L. Ed. 2d 1. This is also true in North Dakota and the concept militates in favor of rather than against multi member districts particularly where population assigned to each senator or representative is small, as it is in North Dakota.

The North Dakota Legislature was aware that "census persons are not voters" (*Gaffney* v. *Cummings*) and made some findings in Section 3 of House Bill 1042 (Chapter 411, 1973 Session Laws) on the subject. See Appendix A9. The number of voters in Grand Forks and Minot Air Bases compared to the census count bears this out.

In the Grand Forks Air Base Primary Election, September 5, 1972, 43 voted. In the General Election in November, 601 voted. In the Special Election of December 4, 1973, 5 voted. The Air Base has a population of 10,474. Bureau of Census PC (1) A 36 ND.

In the Air Base at Minot in the Presidential Election, 1972, 479 voted. At the special election January 5, 1973,

19 voted. At the special election December 4, 1973, 6 voted. The Minot Air Base has a population of 12,077 according to the Bureau of Census report.

The difficult and complex processes of reapportionment takes into account many factors. Each factor and the weight given to each may vary substantially from state to state depending upon the situation in each state. The standards should not be so rigid as to make it too difficult or politically impracticable to be performed by the Legislature and thereby to a degree deny to the states a Republican form of government as guaranteed by Article IV Section 4 of the U.S. Constitution.

We suggest that the courts be required to perform only the de minimis to make a plan valid rather than develop a theoretical concept which will not in reality or politically improve representation in its fullest sense.

The revision of legislative districts even when constitutionally required, creates loss of voter identification with the district and potential candidates which may be as harmful or more so than population variance or deviation in a representative form of government. Revision for sake of refinement should not be the rule except to meet constitutional requirements.

The District Court was and is familiar with the population, geography, and the total government picture of the State of North Dakota. Some of these items are difficult, if not impossible, to reduce to absolutes by extraction, distillation, or analysis, or any other method, but nevertheless are entitled to consideration on the complex question of representation. The Court took these many factors into consideration as has been illustrated by the Memorandum Opinion and Order of Chief Judge Benson filed January 30, 1974. The well reasoned Opinion and Order

with the authorities cited therein succinctly states the position of the Appellee, and any further argument would be repetitious.

CONCLUSION

The Dobson plan is not contrary to the directives of the Court and does not offend the Constitution of the United States, and for this reason the Court should affirm the reapportionment plan established by the District Court.

Dated this 10th day of April, 1974.

Respectfully submitted,

ALLEN I. OLSON
Attorney General
State of North Dakota

By: PAUL M. SAND
First Assistant Attorney General
State Capitol
Bismarck, North Dakota 58501
Attorneys for Appellee

APPENDIX

ORDER OF MAY 22, 1972

Jurisdiction of this controversy rests in this Court by virtue of Title 28, Sections 1331, 1343, and 2281 of the United States Code.

Following oral argument in Fargo, North Dakota, on May 18, 1972, before this District Court of Three Judges, we took this matter under advisement.

Having now considered those arguments, together with the pleadings, affidavits on file and other pertinent documents tendered, we find and conclude as follows:

1. The plaintiffs have made a legally sufficient showing that the existing legislative apportionment scheme in the State of North Dakota fails to meet Federal Constitutional standards.

2. This Court shall attempt to reapportion the legislative districts in the State of North Dakota so as to conform to Federal Constitutional standards, within such time as to be effective for the 1972 primary and general elections.

3. For the purpose of assisting the Court in this endeavor, we appoint Mr. R. R. Smith of Grand Forks, North Dakota, Mr. Richard Dobson of Minot, North Dakota, and Mr. Thomas K. Ostenson of Fargo, North Dakota, as Special Masters, to serve as a Commission under the supervision and direction of this Court. The Commission shall study, formulate and present to us, within thirty days from date hereof, an apportionment plan. In this regard, we offer the following guidelines:

a. The Commission shall try to conform new legislative districts to the existing districts.

b. The Commission shall not substantially change the size of the Legislature.

c. Natural geographic barriers shall be observed.

d. Existing political subdivision lines should be observed, insofar as possible.

e. In the event the Commission should find that it is unnecessary to substantially alter any one or more of the legislative districts presently defined, then it must consider and make recommendations relative to whether or not the incumbent senator or senators, whose term does not expire at the end of this year, must nevertheless stand for election in 1972.

4. We have considered the matter of "multi-member" districts and conclude there is insufficient time prior to the 1972 elections to fully explore and resolve the issues involved. The matter of "multi-member" districts will be studied in depth by the Commission, and the results of that study be made available to us.

5. The burden of paying the necessary expenses incurred in this matter is a proper one to be borne by the State of North Dakota. It is therefore our request that the State of North Dakota, through its Emergency Commission or some other appropriate agency, make available to this Court the initial sum of Five Thousand Dollars ($5,000.00) for the purpose of carrying out the directives outlined herein, the expenditure of such funds to be made only upon our direction.

6. We direct Mr. Roger E. Persinger of Bismarck, North Dakota, an officer of this Court, to advise, assist, and direct the Commission in its work.

IT IS SO ORDERED.

Dated at Fargo, North Dakota this 22nd day of May, 1972.

s/s Myron H. Bright
United States Circuit Judge

s/s Paul Benson
Chief Judge, United States District Court

s/s Bruce M. Van Sickle
Judge, United States District Court

REPORT OF SPECIAL MASTER RICHARD DOBSON

I. INTRODUCTION

This plan to reapportion the North Dakota Legislature would create 41 districts for the election of 51 senators and 102 representatives. The number of multi-senator districts would remain at five.

II. DISTRICTS

The proposed districts conform, both in boundaries and in numbering, quite closely to the existing districts.

III. SIZE

The size of the Senate would be increased by two members and the House of Representatives by four. I believe this is necessary and fair because the plan includes Grand Forks and Minot Air Force bases with their sizable,

transient and largely non-voting populations. If the current size was retained, other areas of North Dakota would, in effect lose two senators and four representatives simply because of the existence of the air bases.

IV. GEOGRAPHICAL BARRIERS

The plan observes natural geographical barriers, such as the Missouri River. Also, and I feel this is important, every district is connected with good arterial roads. It should not be necessary to travel outside of one's district in going from one part of it to another.

V. POLITICAL SUBDIVISIONS

In the formation of districts, parts of 10 counties are attached to an adjoining county or counties. However, in three instances (Burleigh, Ward and Williams), no real violence is done to county lines because an urban district is sealed off and the rural portion of the county is attached to a neighboring rural county. Three other counties which are divided (Barnes, Richland and Walsh) have traditionally been split into two districts. Thus, only four counties (McHenry, Cass, Morton and Stark) suffer any damage in the districting.

In this connection, it should be noted that the greatest complaints about the existing apportionment were voiced over the breaking of county lines, particularly in smaller rural counties. Counties with very small populations should not be split because they are thereby rendered politically powerless. It is a form of de facto disenfranchisement.

VI. POPULATION

As a general rule, deviation from the average population per district decreases if many county lines are vio-

lated and increases if only a few counties are split. A salient feature of this plan in comparison to the 1965 apportionment is that it would reduce both population deviation and divided counties. The ratio of the most populous district to the least would be cut from 1.25-1 to 1.23-1 and the number of split counties would be trimmed from 13 to 10.

In its order of May 22, 1972, the Court did not address itself to the matter of population deviation. However, I feel that anything in the neighborhood of 1.25-1 is constitutionally permissible in a rural state like North Dakota. It results, in most districts, in a deviation of only a few hundred persons from the mean. Such a ratio probably would be excessive in a large urban state because it would result in deviations running into tens of thousands.

VII. THE 13TH DISTRICT

The 13th District in this plan would consist of West Fargo, West Fargo Industrial Park, Barnes and Reed Townships and the Ninth, Tenth, and Eleventh precincts of Fargo. It was created to recognize the growth of West Fargo and its environs. If desired, however, West Fargo could remain in the 21st District, which would then be entitled to five senators and ten representatives. In that case, I would assign the district number "13" to the Grand Forks County floterial district.

VIII. FLOTERIAL DISTRICTS

Once the decision has been made to include the populations of the two air bases for apportionment purposes, the question arises of where to assign this population. Should the air base populations be lumped into urban districts? Or should the rural areas receive the extra representation which will result from counting the air bases?

Or should Minot Air Force Base be given to the Minot urban district and Grand Forks Air Force Base to the Grand Forks County rural district? Or vice versa?

It seems to me that the only fair way to resolve this question is to create floterial districts so that all the people in the air base areas can take part in the election of the extra legislators. Thus everyone residing in the Third and Fifth districts would participate in the election of one senator and two representatives from the 40th District; while the 18th and 19th districts would constitute the other floterial district, the 41st. As a matter of practical politics, it may be expected that both urban and rural legislators will be slated and elected from the floterial districts.

IX. SENATORS

Because the districts in this plan conform rather closely to existing districts, I would recommend that only five of the 26 senators elected in 1970 for four-year terms be ordered to stand for re-election this year. They are Senators Christensen, Swedlund, Doherty, Just and Chesrown. Christensen was elected from the Third District, Swedlund from the Seventh, Doherty from the 13th, Just from the 27th, and Chesrown from the 31st. Christenson would be placed in the Third, Swedlund in the Seventh, Doherty in the 12th, Just in the 28th and Chesrown in the 30th. Therefore, Christensen and Swedlund would run for two-year terms while the others would run for four-year terms.

Also, it would be necessary to elect senators for two-year terms from the 13th, 31st and 41st districts and a senator for a four-year term from the 40th. All other districts presently have the requisite number of incumbents.

Richard R. Dobson
Special Master

"DOBSON PLAN"

No.	District	Pop.	Per Sen.	Sens.	Reps.
1.	Williston Area	12,250	12,250	1	2
2.	Divide, rural Williams	11,615	11,615	1	2
3.	Renville, rural Ward	12,481	12,481	1	2
4.	Burke, Mountrail	13,176	13,176	1	2
5.	Minot area	37,831	12,610	3	6
6.	Bottineau, part McHenry	11,840	11,840	1	2
7.	Pierce, part McHenry	12,956	12,956	1	2
8.	McLean	11,251	11,251	1	2
9.	Rolette	11,549	11,549	1	2
10.	Cavalier, Towner	12,858	12,858	1	2
11.	Pembina	10,728	10,728	1	2
12.	Benson, Eddy	12,349	12,349	1	2
13.	West Fargo area	11,275	11,275	1	2
14.	Foster, Wells	12,679	12,679	1	2
15.	Ramsey	12,915	12,915	1	2
16.	Part Walsh	11,296	11,296	1	2
17.	Nelson, part Walsh	10,731	10,731	1	2
18.	Grand Forks City	39,008	13,003	3	6
19.	Rural Grand Forks Co.	11,620	11,620	1	2
20.	Traill, part Cass	11,534	11,534	1	2
21.	Fargo area	48,967	12,242	4	8
22.	Part Cass	11,448	11,448	1	2
23.	Griggs, Steele, part Barnes	11,007	11,007	1	2
24.	Part Barnes	11,598	11,598	1	2
25.	Part Richland	12,799	12,799	1	2
26.	Dickey, Sargent	12,913	12,913	1	2
27.	Ransom, part Richland	12,392	12,392	1	2

No.	District	Pop.	Per Sen.	Sens.	Reps.
28.	LaMoure, Logan	11,362	11,362	1	2
29.	Stutsman	23,550	11,775	2	4
30.	Emmons, McIntosh	12,745	12,745	1	2
31.	Kidder, Sheridan, rural Burleigh	12,712	12,712	1	2
32.	Bismarck area	35,596	11,865	3	6
33.	Mercer, Oliver, part Morton	13,075	13,075	1	2
34.	Mandan area	12,215	12,215	1	2
35.	Grant, Sioux, part Morton	12,158	12,158	1	2
36.	Dunn, McKenzie	11,021	11,021	1	2
37.	Dickinson	12,405	12,405	1	2
38.	Adams, Hettinger, part Stark	12,566	12,566	1	2
39.	Billings, Bowman, Golden Valley Slope, part Stark	12,743	12,743	1	2
40.	Renville, Ward	-----floterial-----		1	2
41.	Grand Forks Co.	-----floterial-----		1	2

Description not included here

DEPARTMENT OF STATE

Bismarck, North Dakota

TO COUNTY AUDITORS:

In accordance with Sections 16-01-07 and 16-11-07 (as amended) of the North Dakota Century Code, I do hereby certify that the following is the complete text of the Constitutional Measure (amendment) and the Referred Statute (measure) that will be submitted to the voters at the special election to be held on Tuesday, December 4, 1973. The publication of the complete text of the Constitutional Measure (amendment) and the Referred Statute (measure) shall be in columns of six point

light face type with underscored words to be of six point bold face type.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the Great Seal of the State of North Dakota at the Capitol in the City of Bismarck, this 25th day of October, 1973.

Great Seal /s/ Ben Meier
Secretary of State

Constitutional Measure (amendment)
The Bold Face Print is New Material

No. 1

An initiated constitutional amendment to secure equal representation by establishing individual Senate districts and House sub-districts, to authorize a commission to determine the number of legislators within limits and to apportion the state into individual Senate districts and House sub-districts, to establish the method for selection of the commission and to provide for its operation and action and for judicial review of its plan, and to repeal present sections 26, 29, 32, 35, and 214 of the Constitution pertaining thereto.

BE IT ENACTED BY THE PEOPLE OF THE STATE OF NORTH DAKOTA:

1. The state shall be divided into as many districts as there are members of the senate, and each district shall elect one senator. Each district shall consist of compact and contiguous territory. All districts shall be as nearly equal in population as is practicable. Each senate district shall be divided into two house sub-districts, as nearly equal in

population as practicable, which shall each elect one representative.

2. The senate shall be composed of not less than 40 members, nor more than 50 members. The house of representatives shall be composed of members equalling in number twice the number of senators.

3. Within 30 days after the effective date of this provision, eight members of a commission of citizens, none of whom may be legislators, shall be selected as follows: The majority and minority leaders of each house in the preceding session of the Legislature shall each designate two commissioners, by filing a certificate of designation with the Secretary of State. The Secretary of State shall promptly call and convene the first meeting of the eight commissioners so designated and a majority of the eight commissioners shall select the ninth member, who shall be chairman of the commission.

4. It shall be the duty of the commission to determine the number of senators and representatives and to apportion the state into senate districts and house sub-districts. A like commission shall be selected and convened in the same manner, by designation of the eight commissioners within 30 days after the first regular session of the legislature after each federal decennial population census after the adoption of this provision; and such commission shall perform the same duties.

5. The commission shall determine its own procedures, shall meet at times and places, may hold public hearings, may survey population distributions, and may employ assistance, as it may determine. Each commissioner shall be paid per diem and expenses for attending meetings equal to that of a legislator at the legislative session preceding his designation as commissioner. All costs and expenses of the

commission shall be paid by the State Treasurer out of any general funds of the state, upon certification by the chairman of the commission.

6. Upon action by a majority of its members and at least 120 days prior to the first primary for nomination of legislative candidates after the commission is selected, the commission shall complete its legislative plan and file it with the Secretary of State. The plan shall thereupon become law and the commission is dissolved. The Supreme Court of North Dakota, exercising original jurisdiction, may review the plan and, if the plan or any part of it is invalid, may direct the commission to reconvene and file a new plan within a stated time.

7. Sections 26, 29, 32, 35, and 214 of the Constitution of North Dakota are hereby repealed.

Referred Statute (measure)

No. 1

An act to provide for state legislative apportionment, and to repeal Sections 54-03-01, 54-03-01.1, 54-03-01.2, 54-03-01.3, 54-03-01.4 of the North Dakota Century Code, and Chapter 338 of the North Dakota Session Laws of 1965, relating to state legislative apportionment.

BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF THE STATE OF NORTH DAKOTA:

SECTION 1. STATE LEGISLATIVE APPORTIONMENT.) Except as otherwise provided in this section, each legislative district shall be entitled to one senator and two representatives who shall be elected at the general election in 1974. The legislative districts of the state shall be formed as follows:

1. The first district shall consists of the city of Williston, and Williston, Trenton, Hardscrabble, and Buford townships in Williams County.

2. The second district shall consist of Divide County, Forthun, Short Creek, Fay, and Keller townships in Burke County, and all of Williams County, except that portion contained in the first district.

3. The third district shall consist of Renville County, and Ward County, except those portions contained in the fifth and eighth districts.

4. The fourth district shall consist of Mountrail County, and Burke County, except that portion contained in the second district.

5. The fifth district shall consist of the city of Minot, the Minot Air Base, and Harrison, Nedrose, Surrey, Sundre, Eureka, and Waterford townships in Ward County, and shall be entitled to four senators and eight representatives.

6. The sixth district shall consist of Bottineau County, and Pratt, Deep River, Meadow, Mouse River, Willow Creek, Grilley, Little Deep, Layton, Bantry, Normal, Deering, Saline, Gilmore, Wager, Kottle Valley, Egg Creek, Riga, Denbigh, Newport, and Berwick townships, and the unorganized territory designated as townships 157-75, 157-76, and 158-76 in McHenry County.

7. The seventh district shall consist of Pierce County, and McHenry County, except that portion contained in the sixth district.

8. The eighth district shall consist of the city of Wilton, McLean County, and Hiddenwood, Ryder, Cameron, Spring Lake, Rushville, Iota Flat, and Greely townships in Ward County.

9. The ninth district shall consist of Rolette County, and Picton, Sidney, Smith, Mount View, Armoordale, Rock Lake, Monroe, and Howell townships in Towner County.

10. The tenth district shall consist of Cavalier County, Towner County, except that portion contained in the ninth district, and Northfield, Prospect, and Highland Center townships in Ramsey County.

11. The eleventh district shall consist of Pembina County, and Kinloss, Silvesta, Tiber, Lampton, Dundee, and Glenwood townships in Walsh County.

12. The twelfth district shall consist of Benson and Eddy Counties.

13. The thirteenth district shall consist of Sheridan County, Kidder County, Burleigh County, except those portions contained in the eighth and thirtieth districts, and Bull Moose, Chaseley, Lynn and Silver Lake townships in Wells County.

14. The fourteenth district shall consist of Foster County, and Wells County, except that portion contained in the thirteenth district.

15. The fifteenth district shall consist of Ramsey County, except that portion contained in the tenth district.

16. The sixteenth district shall consist of Walsh County, except those portions contained in the eleventh and nineteenth districts.

17. The seventeenth district shall consist of McIntosh and Dickey Counties.

18. The eighteenth district shall consist of the city of Grand Forks, the Grand Forks Air Base, and Grand Forks, Rye, Blooming, and Mekinock townships in Grand Forks County, and shall be entitled to four senators and eight representatives.

19. The nineteenth district shall consist of Grand Forks County, except that portion contained in the eighteenth district, and Sauter, Perth, Cleveland, Medford, Eden, Ops, Forest River, Ardoch, and Walshville townships in Walsh County.

20. The twentieth district shall consist of Traill County, Beaver Creek, Newburgh, Golden Lake, Enger, Sherbrooke, Primrose, Hugo, Edendale, Colgate, and Broadlawn townships in Steele County, and Hunter, Bell, Kinyon, Noble, Gardner, and Wiser townships in Cass County.

21. The twenty-first district shall consist of the cities of Fargo and West Fargo, and Reed Fargo, and Barnes townships in Cass County, and shall be entitled to five senators and ten representatives.

22. The twenty-second district shall consist of Cass County, except those portions contained in the twentieth and twenty-first districts, and Nelson, Norma, Binghampton, Oakhill, Thordenskjold, and Raritan townships in Barnes County.

23. The twenty-third district shall consist of Nelson County, Griggs County, and Steele County, except that portion contained in the twentieth district.

24. The twenty-fourth district shall consist of Barnes County, except those portions contained in the twenty-second and twenty-ninth district.

25. The twenty-fifth district shall consist of Antelope, Ibsen, Dwight, Barney, Mooreton, Center, Belford, Brandenburg, Summit, Brightwood, Waldo, Devillo, Elma, Greendale, LaMars, and Fairmount townships in Richland County.

26. The twenty-sixth district shall consist of Sargent County, Richland County, except that portion contained in the twenty-fifth district, and Coburn, Shenford, Owego, Scoville, Sandown, Sydna, and Rosemeade townships in Ransom County.

27. The twenty-seventh district shall consist of LaMoure County, except that portion contained in the twenty-eighth district, and Ransom County, except that portion contained in the twenty-sixth district.

28. The twenty-eighth district shall consist of Emmons County, Logan County, and Glen, Raney, Swede, and Norden townships in LaMoure County.

29. The twenty-ninth district shall consist of Stutsman County, and Pierce, Uxbridge, Brimer, Eckelson, Mansfield, Meadow Lake, and Greenland townships in Barnes County, and shall be entitled to two senators and four representatives.

30. The thirtieth district shall consist of the city of Bismarck, and Hay Creek, Gibbs, Apple Creek, and Missouri townships, and the unorganized territory designated as townships 137-80 and 138-80 in Burleigh County, and shall be entitled to three senators and six representatives.

31. The thirty-first district shall consist of the city of Mandan, Engelter township, and the unorganized territory designed as townships 139-81, 139-82, 139-83, and 139-84 in Morton County.

32. The thirty-second district shall consist of Grant County, Sioux County, and the unorganized territory designated as townships 133-82, 134-79, 134-80, 134-81, 134-82, 134-83, 134-84, 135-79, 135-80, 135-81, 135-82, 135-83, 135-84, 136-79, 136-80, 136-81, 136-82, 136-83, 136-84, 137-79, 137-80, 137-81, 137-82, 137-83, 137-84, 137-85, 137-86,

137-87, 138-80, 138-81, 138-82, 138-83, 138-84, 138-85, 138-86, 138-87, 138-88, 138-89, and 138-90 in Morton County.

33. The thirty-third district shall consist of Oliver County, Morton County, except those portions contained in the thirty-first and thirty-second districts, and Mercer County, except that portion contained in the thirty-fourth district.

34. The thirty-fourth district shall consist of McKenzie County, Dunn County, Billings County, except that portion contained in the thirty-seventh district, and the unorganized territory designated as townships 145-89, 145-90, 146-89, 146-90, 147-89, and 147-90 in Mercer County.

35. The thirty-fifth district shall consist of Hettinger County and Stark County, except that portion contained in the thirty-sixth district.

36. The thirty-sixth district shall consist of the city of Dickinson.

37. The thirty-seventh district shall consist of Golden Valley County, Slope County, Bowman County, Adams County, and Medora township, and the unorganized territory designated as townships 137-100, 137-101, 137-102, 138-100, 138-101, 138-102, 139-100, 139-101, 139-102, 140-100, and 140-101 in Billings County.

SECTION 2. NUMBERING LEGISLATIVE DISTRICTS.—CLASSES OF SENATORS TO PROVIDE STAGGERED TERMS.) Senators shall be divided into two classes: those elected in legislative districts designated by even numbers shall constitute one class, and those elected in legislative districts designated by odd numbers shall constitute the other class. The senators of one class elected in the year 1974 shall hold their office for two years, those of the other class elected in the year 1974

shall hold their office for four years, and the determination of which class shall be elected for four years and which class shall be elected for two years shall be by lot. The president of the senate shall perform the lot in the presence of the majority and minority floor leaders of the senate and shall certify in writing the results of such lot to the secretary of state within thirty days after the effective date of this Act.

SECTION 3. LEGISLATIVE FINDING.) The legislature was cognizant of and has taken into consideration the methods and procedures employed by the census bureau in taking the census and the creation of enumeration districts, which do not necessarily coincide with the geographic boundaries of political sub-divisions such as townships and smaller cities. The legislature in numerous instances was required to interpolate and calculate the population in rural areas, including townships, on information available. It is also known that many persons maintained a dual residence, one for voting purposes and one where they physically resided. It has been common practice for many persons upon reaching semiretirement age or upon retiring, to locate in a city, but retain their residence on a farm. However, for census purposes, they were listed in the city's population. Because of these items, mathematical exactness or precision in population is impossible, and because of the cost and effort to produce the necessary information to accomplish this, it is impractical.

The legislature also recognizes and has taken into consideration the following statistical information including district population, population per senator, and population variance above and below the average population per senator:

Legislative District	Counties	Number of Senators	Total Population	Population Per Senator	Population Variance
1.	Pt. Williams	1	12,436	12,436	+0.6
2.	Divide, Pt. Burke, Pt. Williams	1	12,202	12,202	–1.2
3.	Renville, Pt. Ward	1	12,325	12,325	–0.2
4.	Mountrail, Pt. Burke	1	12,403	12,403	+0.4
5.	Pt. Ward	4	49,147	12,287	–0.6
6.	Bottineau, Pt. McHenry	1	12,427	12,427	+0.6
7.	Pierce, Pt. McHenry	1	12,369	12,369	+0.1
8.	McLean, Pt. Burleigh, Pt. Ward	1	12,266	12,266	–0.7
9.	Rolette, Pt. Towner	1	12,288	12,288	–0.5
10.	Cavalier, Pt. Towner, Pt. Ramsey	1	12,505	12,505	+1.2
11.	Pembina, Pt. Walsh	1	12,588	12,588	+1.9
12.	Benson, Eddy	1	12,348	12,348	–0.1
13.	Sheridan, Kidder, Pt. Burleigh, Pt. Wells	1	12,082	12,082	–2.2

Legislative District	Counties	Number of Senators	Total Population	Population Per Senator	Population Variance
14.	Foster, Pt. Wells	1	12,183	12,183	-1.4
15.	Pt. Ramsey	1	12,529	12,529	+1.4
16.	Pt. Walsh	1	12,588	12,588	+1.9
17.	McIntosh, Dickey	1	12,521	12,521	+1.3
18.	Pt. Grand Forks	4	50,821	12,705	+2.8
19.	Pt. Grand Forks, Pt. Walsh	1	12,084	12,084	-2.2
20.	Traill, Pt. Cass	1	12,191	12,191	-1.3
21.	Pt. Cass	5	61,157	12,231	-1.0
22.	Pt. Cass, Pt. Barnes	1	12,233	12,233	-1.0
23.	Nelson, Griggs, Pt. Steele	1	12,501	12,501	+1.2
24.	Pt. Barnes	1	12,336	12,336	-0.2
25.	Pt. Richland	1	12,389	12,389	+0.3
26.	Sargent, Pt. Richland, Pt. Ransom	1	12,375	12,375	+0.2
27.	Pt. Ransom, Pt. LaMoure	1	12,379	12,379	+0.2
28.	Emmons, Logan, Pt. LaMoure	1	12,547	12,547	+1.6

Legislative District	Counties	Number of Senators	Total Population	Population Per Senator	Population Variance
29.	Stutsman, Pt. Barnes	2	24,734	12,367	+0.1
30.	Pt. Burleigh	3	36,623	12,208	-1.2
31.	Pt. Morton	1	12,763	12,763	+3.3
32.	Grant, Sioux, Pt. Morton	1	12,344	12,233	-0.1
33.	Oliver, Pt. Morton, Pt. Mercer	1	11,923	11,923	-3.5
34.	McKenzie, Dunn, Pt. Billings, Pt. Mercer	1	12,154	12,154	-1.6
35.	Hettinger, Pt. Stark	1	12,283	12,283	-0.6
36.	Pt. Stark	1	12,405	12,405	+0.4
37.	Golden Valley, Slope, Bowman, Adams, Pt. Billings	1	12,312	12,312	-0.3

Ideal population per district (617,761 divided by 50)	12,355
Largest district per senator	12,763
Smallest district per senator	11,923
Deviation in percent, largest district	+3.3
Deviation in percent, smallest district	-3.5
Number of senators (each district to be represented in the house by two members per senator)	50

SECTION 4. LEGISLATIVE COMMENDATION.) The legislature recognizes the diligent efforts of the members of the legislative council's special committee on reapportionment, and commends the bipartisan committee consisting of senators Gail Hernett, chairman, L. D. Christensen, and Francis J. Butler; representatives Richard J. Backes, Donald Giffey, and I. O. Hensrud; and citizen members, Messrs. William Greenagel, Leo Stein, Tom Roney, Ted Hardmeyer, and Ernest Johnson for formulating and selecting a reapportionment plan which met with unanimous approval of the members present at the final committee meeting.

SECTION 5. REPEAL.) Sections 54-03-01, 54-03-01.1, 54-03-01.2, 54-03-01.3, and 54-03-01.4 of the 1965 Supplement to the North Dakota Century Code, and Chapter 338 of the 1965 North Dakota Session Laws are hereby repealed.

No. 12135

UNITED STATES OF AMERICA
STATE OF NORTH DAKOTA

TO ALL TO WHOM THESE PRESENTS SHALL COME,

I, Ben Meier, Secretary of State of the State of North Dakota, do hereby certify that:

The Special Election held on December 4, 1973, resulted in the following votes cast on the Constitutional Measure (amendment) and the Referred Statute (measure).

CONSTITUTIONAL MEASURE (amendment)

Number of votes cast YES—43,178: NO—53,831

REFERRED STATUTE (measure)

Number of votes cast YES—44,363: NO—50,729.

The above results were established by the State Canvassing Board which convened on December 14, 1973 and have been recorded by me as provided for by law.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the Great Seal of the State at the Capitol in the City of Bismarck, this 17th day of December, A.D., 1973.

/s/ Ben Meier
Secretary of State

GRAND FORKS COUNTY
NORTH DAKOTA

CERTIFICATE

State of North Dakota)
) ss
County of Grand Forks)

I hereby certify that the Votes cast at the Grand Forks Air Force Base at the Primary Election held on the 5th day of September, 1972 were 43; at the general election held on the 7th day of November, 1972 were 601 votes; and at the Special Election held on the 4th day of December, 1973 were 5 votes according to the Official Abstract of Votes for said elections.

Given under my hand and seal this 18th day of December, 1973.

/s/. C. E. Overland
County Auditor
Grand Forks County
North Dakota

Seal

WARD COUNTY, NORTH DAKOTA
AUDITOR'S OFFICE
MINOT, NORTH DAKOTA

STATE OF NORTH DAKOTA

COUNTY OF WARD

I, Gladys C. Pederson, County Auditor in and for Ward County, North Dakota, do hereby certify that the Minot Air Force Base is located partly in Tatman Township and partly in Waterford Township of Ward County, which civil townships constitute two of the voting precincts in Ward County, and that said townships are a part of the 3rd Legislative District excepting for the areas consisting of the Air Base, which Air Base area constitutes a part of the 5th Legislative District.

I do further certify that according to the records in my office the legislative vote in the townships of Tatman and Waterford for the 5th Legislative candidates (indicating the military vote cast) reveals the following vote:

Election	Tatman	Waterford
Presidential of 11/7/72	256	223
Special 5th Dist. of 1/5/73	12	7
Special Election of 12/4/73	2	4

Dated at Minot, North Dakota this 18th day of December, 1973.

/s/ Gladys C. Pederson
County Auditor

JUN 12 1974
MICHAEL RODAK, JR., C

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 73-1406

DANIEL CHAPMAN and JACQUE STOCKMAN,
Appellants,

vs.

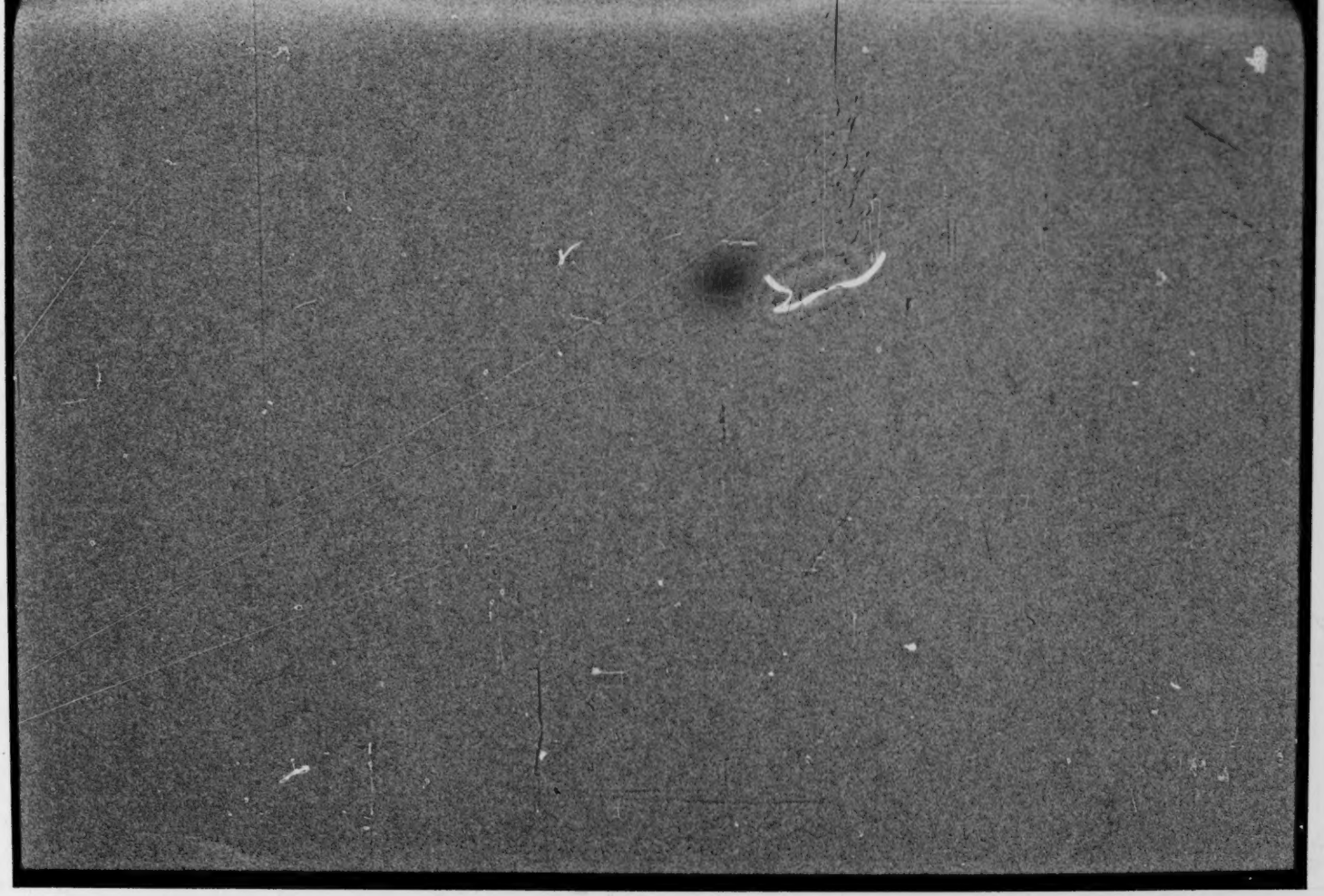
BEN MEIER, Secretary of State for the
State of North Dakota,
Appellee.

On Appeal from the United States District Court for the
District of North Dakota

APPELLANTS' BRIEF

JOHN D. KELLY
609½ First Avenue North
Post Office Box 1389
Fargo, North Dakota 58102
Counsel for Appellants

St. Louis Law Printing Co., Inc., 812 Olive Street 63101 314-231-4477



INDEX

	Page
Table of Cases	i
Table of Constitutional Provisions and Statutes	ii
Opinions Below	1
Jurisdiction	2
Constitutional Provisions Involved	2
Questions Presented	3
Statement	3
Summary of Argument	7
Multi-Member Districts	7
Population Variances Between Districts	7
Argument	9
Multi-Member Districts	9
Population Variances Between Districts	17
Conclusion	25

Table of Cases

Chapman v. Meier, 372 F.Supp. 363 (1972) 1, 6, 19
Chapman v. Meier, 372 F.Supp. 371 (1974) 1, 6, 20, 24
Connor v. Johnson, 402 U.S. 690 (1971) 3, 4, 7, 9, 11, 12, 13, 15, 17, 25
Connor v. Williams, 404 U.S. 549 (1972) 12
Fortson v. Dorsey, 375 U.S. 433 (1965) 13

Gaffney v. Cummings, 412 U.S. 735 (1973) 25

Lucas v. Forty-Fourth General Assembly of Colorado, 377 U.S. 713 (1964) 12

Mahan v. Howell, 410 U.S. 315 (1973) ..3, 13, 14, 18, 20, 25
Minnesota State Senate v. Beens, 406 U.S. 187 (1972) ..13, 15

Paulson v. Meier, 232 F.Supp. 183 (1964) 3, 10, 11
Paulson v. Meier, 246 F.Supp. 36 (1965) ..3, 4, 10, 11, 18, 26

Reynolds v. Sims, 377 U.S. 533 (1964) 3, 8, 25

State, ex rel. Stockman v. Anderson, 184 N.W.2d 53 (1971) 11
Swann v. Adams, 385 U.S. 440 (1967) 25
Swann v. Charlotte-Mecklenburg Bd. of Ed., 402 U.S. 1 (1971) 12

Taylor v. McKeithen, 407 U.S. 191 (1972) 16
Turner v. McKeithen, 490 F.2d 191 (1973) 15

Whitcomb v. Chavis, 403 U.S. 124 (1971) 3, 12, 13, 15
White v. Register, 412 U.S. 755 (1973) 13, 14, 25

Zimmer v. McKeithen, 485 F.2d 1297 (1973) 15

Table of Constitutional Provisions and Statutes

Fourteenth Amendment, United States Constitution 2, 7

Section 29, North Dakota Constitution 9

Section 214, Article XVIII, North Dakota Constitution .. 10

28 U.S.C. § 1253 2

28 U.S.C. § 1331 2

28 U.S.C. § 1343 2

28 U.S.C. § 2281 2

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 73-1406

DANIEL CHAPMAN and JACQUE STOCKMAN,
Appellants,

vs.

BEN MEIER, Secretary of State for the
State of North Dakota,
Appellee.

On Appeal from the United States District Court for the
District of North Dakota

APPELLANTS' BRIEF

OPINIONS BELOW

The Opinion of the Court below dated January 30, 1974, including the dissent by Judge Bright, is reported at 372 F.Supp. 371. The Opinion and dissent are also printed at pages A-1 through A-53 of the Appendix to the Jurisdictional Statement. The Opinion of the Court entered June 30, 1972, including the dissent by Judge Benson, is reported at 372 F.Supp. 363. The Opinion, including the dissent, is printed at pages A-57 through

A-67 of the Appendix to the Jurisdictional Statement. The Order of the Court filed May 22, 1972, has not been reported. The Order is printed at pages A-54 through A-56 of the Appendix to the Jurisdictional Statement. It has also been printed at pages A1 through A3 of the Appendix to the Motion to Affirm.

JURISDICTION

This is an injunctive action against the North Dakota Secretary of State. The action was initiated pursuant to 28 U.S.C. §§ 1331, 1343, and 2281.

The Judgment appealed from is dated and was entered on January 30, 1974. Notice of Appeal was filed on February 27, 1974, in the United States District Court for the District of North Dakota. Appellants believe 28 U.S.C. § 1253 confers jurisdiction on this Court.

The Judgment appealed from is a final one establishing a permanent apportionment plan for the North Dakota Legislature based on the 1970 census. The Judgment denies plaintiffs the injunctive relief sought under their Amended Complaint. Plaintiffs contend that the Court-fashioned reapportionment plan adopted by the Judgment appealed from is Constitutionally deficient and in conflict with the directive by this Court relating to single-member legislative districting.

Appellants' Jurisdictional Statement was filed March 20, 1974. Jurisdiction was noted by this Court on April 29, 1974.

CONSTITUTIONAL PROVISIONS INVOLVED

Fourteenth Amendment to the Constitution of the United States.

QUESTIONS PRESENTED

1. In the absence of unique factors as in *Mahan v. Howell*, 410 U.S. 315, 333, and without any established state policy supporting multiple-member legislative districts as in *Whitcomb v. Chavis*, 403 U.S. 124, was the District Court free to ignore the general rule concerning the creation of multi-member legislative districts as set out in *Connor v. Johnson*, 402 U.S. 690, in fashioning a reapportionment plan for the North Dakota Legislature?

2. Do the disparities in population among legislative districts under the Court-fashioned reapportionment plan for the North Dakota Legislature establish a per se violation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution? If not, did the District Court enjoy the same latitude and discretion as is afforded state legislatures under *Mahan v. Howell*, 410 U.S. 315, in adopting reapportionment plans containing population disparities among legislative districts, or is the Court held to a stricter standard?

STATEMENT

In 1964, on the basis of *Reynolds v. Sims*, 377 U.S. 533, a three-member District Court rejected a 1963 North Dakota legislative apportionment plan. The Court also voided Sections 26, 29, and 35 of the North Dakota Constitution upon which the plan was based. *Paulson v. Meier*, 232 F.Supp. 183 (hereinafter *Paulson I*). In 1965, the same three-member Court invalidated a new plan adopted by the North Dakota Legislature because of impermissible population disparities and ordered into effect a plan designed by the Court based upon the 1960 census. Among other things, this plan created five (5) large multi-member senator and representative districts. *Paulson v. Meier*, 246 F.Supp. 36 (hereinafter *Paulson II*).

Upon the failure of the North Dakota Legislative Assembly to apportion itself on the basis of the 1970 census, this action was commenced in November of 1971 seeking a determination that the *Paulson II* plan was no longer valid under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution and asking that the defendant be restrained and enjoined from administering the laws pertaining to the elections of members of the North Dakota Legislature under the *Paulson II* plan. Plaintiffs requested the Court to design a constitutionally valid reapportionment plan that would provide for single-member districts in accordance with the rule promulgated by the United States Supreme Court in *Connor v. Johnson*, 402 U.S. 690.

By Order of May 22, 1972, the *Paulson II* plan was stricken as failing to meet Federal Constitutional standards. The Court appointed a commission to prepare a plan that could be utilized at the 1972 primary and general elections. Concerning the question of multi-member districts, the Order said:

> "We have considered the matter of 'multi-member' districts and conclude there is insufficient time prior to the 1972 elections to fully explore and resolve the issues involved. The matter of 'multi-member' districts will be studied in depth by the Commission, and the results of that study be made available to us." (See pp. A-54-A-56, Appendix to Jurisdictional Statement.)

By Opinion and Order filed June 30, 1972, an interim plan was adopted (hereinafter "Dobson Plan"). Defendant Meier was directed to conduct only the 1972 elections under the plan. The Court retained jurisdiction to adopt a permanent plan following the 1972 elections.

Concerning the issue of multi-member districts, the majority stated:

"We briefly comment on the continuation of the five multi-member senatorial districts in which are located the cities of Fargo, Grand Forks, Minot, Bismarck, and Jamestown. In the most populous 21st district, encompassing the Fargo area, voters may be called upon to elect fifteen members of the legislative assembly to represent that district, five to serve in the Senate and ten to serve in the House of Representatives. In each of the other multi-member districts, the electors may also be called upon to elect a substantial number of representatives at a single election. If each of the major political parties endorses a full slate of candidates, the electorate in the largest multi-member district could be called upon to judge the qualifications of at least thirty candidates for state legislative office. In such circumstances, the task confronting a voter in making a considered choice among individual candidates would appear to be most formidable.

"The five multi-member legislative districts were created by the Federal District Court in Paulson v. Meier, 246 F.Supp. 36 (D. N.D. 1965), and not by enactment of the Legislative Assembly. In light of subsequent Supreme Court pronouncements, we believe it would be improper for this Court to permit their continuation in a court-fashioned plan. In Connor v. Johnson, 402 U.S. 690 (1971), the Court stated:

> '* * * (W)hen district courts are asked to fashion apportionment plans, single-member districts are preferable to large multi-member districts as a general matter. Id. at 692.'

The Supreme Court subsequently re-emphasized this ruling in Connor v. Williams, 404 U.S. 549, 551 (Jan. 24, 1972). We feel constrained to permit multi-member districts to continue during the 1972 elections, however to avoid extreme disruptions in the elective processes. We

> recognize that political party organizational structure has been formed, for elections subsequent to the 1965 apportionment decision, along legislative district lines. *See generally* Ch. 16-17 NDCC. We recognize that it takes considerable time for members of a political party to organize and operate effectively for the benefit of the electorate, following a change in district boundaries. We think it inappropriate, therefore, to change the method of selecting the members of the legislative assembly in these multi-member districts at this late date in light of the confusion which such a change would likely precipitate. We feel that the electorate will be better served by minimizing the confusion surrounding the impending elections, than it would be by the abolition of multi-member districts at this eleventh hour." (Author's emphasis.) 372 F.Supp. 363, 366.

Relative to population disparities among legislative districts, the majority noted:

> "We recognize certain weaknesses in the Dobson Plan, namely, (1) some variance in population among the legislative districts, which, in a few instances, seems substantial; * * *" 372 F.Supp. 363, 366.

Because of infirmities in the Dobson Plan, the Court retained jurisdiction of the case in order to adopt a different plan of reapportionment without being hampered by considerations of the impending elections.

Contrary to the June 30, 1972, Memorandum Opinion and Order, a reconstituted majority of the District Court issued an Opinion on January 30, 1974, making permanent the 1972 interim Dobson Plan, which included five (5) multi-member districts containing up to fifteen (15) members, as well as providing for legislative districts with population disparities of more than twenty per cent (20%). See *Chapman v. Meier*, 372 F.Supp. 371.

SUMMARY OF ARGUMENT

Multi-Member Districts

Recognizing the inherent inequities in large multi-member legislative districts, the United States Supreme Court, in *Connor v. Johnson*, 402 U.S. 690, directed that as a general rule when District Courts are required to fashion reapportionment plans they should do so on the basis of single-member districts. The State of North Dakota has neither Constitutional provisions nor statutory enactments that conflict with the equitable remedy of single-member districts. There are no unique factors that justify the imposition of large multi-member districts for the urban areas of North Dakota. Traditionally North Dakota has selected its state senators from single-member districts. The plan fashioned by the United States District Court for the District of North Dakota includes five (5) large multi-member districts containing up to fifteen (15) members and involving both houses of the state legislature. The imposition of large multi-member districts for North Dakota's urban areas under the Court-fashioned reapportionment plan based on the 1970 census is arbitrary and constitutes a breach of discretion by the District Court.

Population Variances Between Districts

The population disparity between the largest and the smallest legislative district, under the Court-approved Dobson Plan of reapportionment for the North Dakota Legislature, is more than twenty per cent (20%) or a deviation ratio of 1.23-1. Numerous other districts contain substantial variances, both on a percentage and ratio basis. There are no natural geographical barriers that justify the population deviations among the legislative districts. The guiding principle of equal representation mandated by the Fourteenth Amendment of the United States Constitution has been discarded by the District Court.

Population deviations are beyond permissible Constitutional limits; and the Dobson Plan per se offends the Equal Protection Clause.

Population disparities among legislative districts are not incident to the effectuation of any discernible state policy, Constitutional or statutory. The fact that North Dakota is sparsely settled and is "barren" of electorally victimized minorities provides no support for imposition of the Dobson Plan. The basic doctrine of "one man, one vote" promulgated under *Reynolds v. Sims*, 377 U.S. 533 (1964), and reapportionment cases subsequent thereto was not principally formulated for the protection of electorally victimized minorities. Rather, by assuring each citizen equal voting power, it is designed to assure that the voting majority will not be victimized by a minority whose votes are accorded greater weight.

Absent unique factors or established state policies justifying limited population variances, a District Court, in fashioning a reapportionment plan, must do so upon the standard of a good-faith effort to achieve absolute population equality among the legislative districts.

ARGUMENT

Multi-Member Districts

In the face of *Connor v. Johnson*, 402 U.S. 690 (1971), the District Court refused to establish single-member legislative districts in adopting a permanent apportionment plan for the North Dakota Legislature. The majority justified their refusal in these words:

> "The issue of multi-member districts or single-member districts is clearly a political issue to be resolved by the electorate and the legislature. In devising a plan, this Court will go no further than is required to formulate a constitutionally sufficient apportionment plan for the State of North Dakota, and will not intrude on the political realm." 372 F.Supp. 371, 377.

Connor v. Johnson was discarded as a racial discrimination case; and the majority enumerated decisions by this Court subsequent thereto as justifying its holding.

Since statehood and until 1965, North Dakota had a clearly articulated state Constitutional policy requiring single-member state senate districts (See Section 29 of North Dakota Constitution, Original and 1960 Amendment, p. 23, Single Appendix). Respondent, in his Motion to Affirm, suggests that the policy of single-senator districts was part and parcel of a "little federal system." That contention is inaccurate in the extreme. Originally, Section 29 of the Constitution of North Dakota mandated that senatorial districts ". . . as nearly as may be, shall be equal to each other in the number of inhabitants entitled to representation." The only impediment to absolute equality of population among senate districts was the restriction that ". . . no portion of any county shall be attached to any other county or part thereof so as to form a district." (See p. 23, Single Appendix)

Not only did the original North Dakota Constitution set out standards for legislative districting, Article VXIII, Section 214, of the North Dakota Constitution actually apportioned senatorial and representative districts. A review of the relevant portions of Section 214 reveals that within the limitation prohibiting attaching part of one county to all or part of another county, the original apportionment was designed to establish senate districts of equal population. Under Section 214, as many as four (4) counties were joined together to form a single senatorial district. Other counties were divided into as many as three (3) separate senatorial districts. Not satisfied that substantial equality had even then been achieved, the framers of Section 214 apportioned as many as three (3), and in one case four (4), representatives for certain legislative districts while limiting others to a single representative. The allocation of representatives among the legislative districts on this basis was designed to further compensate for unavoidable population imbalances among senatorial districts.

The 1960 North Dakota Constitutional Amendments pertaining to senate districting were designed to maintain the then status quo and were not primarily directed toward the preservation of districts on a county basis. After 1960 as before, certain senate districts constituted two or more entire counties while other counties continued to have at least two separate senate districts. Any connection between the pre-1965 system and a "little federal system" is beyond appellants' powers of observation.

In *Paulson I*, 232 F.Supp. 183, the United States District Court for the District of North Dakota purported to void Constitutional provisions that mandated single-member senatorial districts. In 1965, the same Court reapportioned the legislature under a plan that for the first time created several large multi-member senator districts. See *Paulson II*, 246 F.Supp. 36. In 1971, the North Dakota Supreme Court affirmed that neither

amended Section 29 of the North Dakota Constitution nor original Section Section 29 retained any vitality. *State ex rel. Stockman v. Anderson*, 184 N.W.2d 53.

Despite efforts at Constitutional revision and reform, the state Constitutional provisions voided under *Paulson I*, supra, have never been replaced. Putting aside historical considerations, the very most that can be said in support of multi-member senatorial districts is that at present they are not in conflict with any current provisions of the North Dakota Constitution. Of course, nothing in the state Constitution expressly or implicitly suggests that such districting advances any state policy.

Nor is there any statutory policy in North Dakota that supports a system of large multi-member senatorial districts for the state's urban areas. The majority opinion cannot be justified on the basis of implementing either a Constitutional or statutory state policy.

Indeed, in an historical context, the action of the District Court in *Paulson II*, supra, and the action of the majority of the Court in this case should properly be viewed as an unwarranted intrusion upon the long-standing legitimate North Dakota tradition of single-member senate districts. In this context, the Court's pronouncement that it will not intrude into the political realm is indeed ironic. What appellants ask is simply this: That in accordance with the traditions of North Dakota and the rule enunciated by this Court in *Connor v. Johnson*, supra, the reapportionment plan for the North Dakota Legislature provide for single-senator districts.

The majority opinion does not claim that multi-member senator districts advance any discernible state policy. The imposition of large multi-member districting has had a chaotic effect on the political process in North Dakota. In light of the political struggles over a ten (10) -year period relating to multiple-

.nember legislative districting, appellants ask what rule of law permits the District Court to remand the people of North Dakota to the "political realm" for relief from a system the Court itself, and not the political system, created?

In *Connor v. Johnson*, 402 U.S. 690, 692, this Court stated:

> "Where district courts are forced to fashion apportionment plans, single member districts are preferable to large multi-member districts as a general rule."

The rule is phrased in simple and understandable terms and ought not to be difficult to comprehend. It was re-emphasized in *Connor v. Williams*, 404 U.S. 549, 551. Contrary to the majority opinion below, its application is not restricted to cases of racial discrimination. The rule constitutes a superintending directive from this Court to District Courts applicable when, because of Constitutional infirmities in existing legislative apportionment plans, District Courts are required to invoke their equity powers in fashioning Constitutionally valid reapportionment plans.

The promulgation of such superintending direction through the issuance of guidelines to District Courts is a long-standing practice by this Court. See, for example, *Swann v. Charlotte-Mecklenburg Bd. of Ed.*, 402 U.S. 1 (1971).

The reasons for the rule are articulated in decisions such as *Lucas v. Forty-Fourth General Assembly of Colorado*, 377 U.S. 713, 731 (1964), and *Whitcomb v. Chavis*, 403 U.S. 124, 157-160 (1971), detailing the undesirable and inequitable features of large multi-member districts. As enumerated by Judge Bright in his dissent, a single-member senate district plan for North Dakota would correct a number of inequities observable in the Dobson Plan and its predecessor. (See *Chapman v. Meir*, 372 F. Supp. 371, 391 (1974))

The majority opinion seeks to justify imposition of the multiple-member district plan on the authority of decisions by this Court such as *Whitcomb v. Chavis*, supra, *Mahan v. Howell*, 410 U.S. 315 (1973), *White v. Register*, 412 U.S. 755 (1973), *Minnesota State Senate v. Beens*, 406 U.S. 187 (1972), and *Fortson v. Dorsey*, 375 U.S. 433 (1965). Not any of these cases are, in fact, supportive. The essential holding in *Fortson v. Dorsey*, supra, is that multi-member districts do not per se offend the Equal Protection Clause. That is not the issue here. Note also that in *Fortson*, supra, multiple member districts were established by Georgia law; and there is no comparable North Dakota state statute.

In *Whitcomb v. Chavis*, supra, the contention was that at-large election of senators and representatives for Marion County, Indiana, was Constitutionally impermissible. This Court, in sanctioning a statewide legislative reapportionment by the District Court, rejected the division of Marion County into single-member legislative districts on the basis that there was no showing that a county-wide district deprived persons of Constitutionally protected rights and because the Indiana State Constitution prohibited the division of a county for senatorial apportionment. As already emphasized, there is no comparable Constitutional provision in North Dakota, and thus no state Constitutional policy that would justify avoidance of the *Connor v. Johnson* rule. *Whitcomb* was issued four (4) days after *Connor*. They are not in conflict. *Connor* articulates a general rule, not an universal one. There are exceptions. *Whitcomb* identifies and defines one of these exceptions, namely that absent Constitutional grounds, a Court should not fashion a single-member district apportionment plan in the face of a contrary state Constitutional provision.

Mahan v. Howell, 410 U.S. 315, at 331-332 (1973), actually reaffirms the *Connor* rule. The decision states:

> "The [district] court conscientiously considered both the legislative policy and this court's admonition in Connor v.

> Johnson, supra, that in fashioning apportionment remedies, the use of single-member districts is preferred. But it was confronted with plausible evidence of substantial malapportionment with respect to military personnel * * * and the fear that too much delay would have seriously disrupted the fall 1971 elections. Facing as it did this singular combination of unique factors, we cannot say that the District Court abused its discretion in fashioning the interim remedy of combining the three districts into one multimember district."

Mahan thus recognizes that the rule requiring single-member legislative districts in Court-fashioned plans is a general one, subject to exception when unique circumstances are present. In *Mahan*, the combination of unique factors involved military personnel; and the majority opinion simply acknowledges that, under the particular situation, it was not a breach of discretion for the District Court to combine three districts into one multimember district.

Plaintiffs have indicated in their Jurisdictional Statement that some type of multi-member districts may be required with regard to the treatment of military personnel assigned to the Grand Forks Air Force Base and to the Minot Air Force Base. (See p. 12, Jurisdictional Statement). In contrast to the District Court in *Mahan*, the majority opinion below identifies no unique factors justifying formulation of large multi-member districts. The problem with regard to proper treatment of military personnel was not even mentioned by the majority and clearly does not warrant the imposition of the large multi-member districts fashioned by the Court.

White v. Register, supra, in no way supports the majority decision. *White* simply stands for the rule that state imposed multi-member districts cannot be maintained upon a showing that they result in a deprivation of Constitutionally protected rights.

Minnesota State Senate v. Beens, supra, holds that in fashioning an apportionment plan. District Courts must not only consider legitimate state Constitutional provisions (*Whitcomb*) but also applicable state statutory law. (In this instance, statutory provisions concerning the size of the legislature.) Of course, North Dakota has neither Constitutional nor statutory provisions that would provide an exception to *Conner*.

Appellants call attention to *Turner v. McKeithen*, 490 F.2d 191 (1973) and *Zimmer v. McKeithen*, 485 F.2d 1297 (1973). The question as to whether these cases represent appropriate applications of *White v. Register*, supra, is beyond the scope of the issues presented on this appeal. However, the decisions do reflect an appreciation by the Fifth Circuit that the Standard for Federal Courts in fashioning reapportionment plans is the equitable policy enunciated in *Connor v. Johnson*, supra. In *Zimmer*, supra, at 1307-1308, the Fifth Circuit observed:

> "We conclude our analysis in this case by returning to the point at which we began when we noted that this is not a case wherein a district court reapportionment plan approving at-large elections is challenged merely as an abuse of discretion. Where such a challenge is registered, our starting point would be Connor v. Johnson, supra, in which the Supreme Court announced that single-member districts are preferable to large multi-member districts. This preference is not, however, an unyielding one. As the Supreme Court admonished in Whitcomb v. Chavis, supra, 403 U.S. at 161, 91 S.Ct. at 1878, 29 L.Ed.2d 363, '[t]he remedial powers of an equity court must be adequate to the task, but they are not unlimited'. Lest our decision today be misconstrued to narrowly circumscribe the discretion of a district court in fashioning a reapportionment plan itself free from constitutional infirmity, we would note that the preference for single-member districts may yield in two situations.

"Where a district court determines that significant interest would be advanced by the use of multi-member districts and the use of single-member districts would jeopardize constitutional requirements, it can employ multi-member districts. See Mahan v. Howell, supra, 410 U.S. at 334-335, 93 S.Ct. 979, 35 L.Ed.2d 320. But these significant interests must not themselves be rooted in racial discrimination. Cf. Taylor v. McKeithen, supra, 407 U.S. at 194, 92 S.Ct. at 1982, 32 L.Ed.2d at 650, n. 3; White v. Weiser, 412 U.S. 783, 796, 93 S.Ct. 2348, 2355, 37 L.Ed.2d 335, 347 (1973).

"The preference may also yield where a district court determines that multi-member districts afford minorities a greater opportunity for participation in the political processes than do single-member districts. In the process of making such a determination, a court need not be oblivious to the existence and location of minority voting strength. While not required to formulate a plan that assures the success of a minority at the polls, a court may in its discretion opt for a multi-member plan which enhances the opportunity for participation in the political processes."

Note that since the District Court most assuredly did not impose large multi-member districts in North Dakota to advance the voting strength of minorities, the validity of the Fifth Circuit's second exception to the application of the equitable policy of single-member districting is not before the Court on this appeal.

In a footnote to *Taylor v. McKeithen*, 407 U.S. 191, at 194 (1972), this Court noted:

"3. Although similar in some respects, this case is not controlled by Whitcomb v. Chavis, 403 U.S. 124. To be sure, in both cases the District Courts were writing on clean slates in the sense that they were fashioning court-imposed reap-

> portionment plans. And, in each case the equitable remedy of the court conflicted with a state policy. (There the state policy favored multi-member districts whereas there the policy favors maintenance of traditional boundaries.) The important difference, however, is that in Whitcomb it was conceded that the State's preference for multi-member districts was not rooted in racial discrimination, 403 US, at 149. Here, however, there has been no such concession and indeed, the District Court found a long 'history' of bias and franchise dilution in the State's traditional drawing of district lines. Cf. id., at 155."

Upon its Order of May 22, 1972 (pp. A-54-A-56, Appendix to Jurisdictional Statement), the United States District Court for the District of North Dakota had a "clean slate" upon which to fashion a reapportionment plan for the North Dakota Legislature. No state policy was in conflict with the equitable remedy of establishing single-member districts in accordance with *Connor v. Johnson*, supra. Since the majority opinion presents no justification for not providing the equitable remedy directed by this Court; and, in fact, there is no justification, the refusal to at least fashion single-member senate districts, constitutes an arbitrary breach of discretion by the District Court and requires a reversal of the Judgment entered by the Court pursuant to the majority opinion.

Population Variances Between Districts

Statistical information concerning the Dobson Plan discloses population disparities far beyond any heretofore sanctioned by this Court. On the basis of the 1970 census, the ideal senate district in North Dakota consists of 12,112 persons per senator. The maximum percentage variation between two (2) districts under the Dobson Plan is 20.14%—the Fourth District being under represented by 8.71%, and the Eleventh District being over represented by 11.43%. The population ratio between

these two (2) districts is 1.23-1. The average percentage variance under the plan is ± 5.07%. Seventeen (17) districts are over represented by an average of 6.03%. Twenty-one (21) districts are under represented by an average of 4.29%. Of the thirty-eight (38) districts created by the plan, twenty-four (24) exceed a 4% variance from the ideal. Fourteen (14) districts exceed a 6% variance, six (6) districts exceed 8%, and three (3) districts exceed a 10% variance from the ideal. See *Mahan v. Howell*, 410 U.S. 315, 319, for comparable data relating to the Virginia apportionment plan as enacted by the Virginia General Assembly. The Court-fashioned Dobson Plan for North Dakota presents variances substantially beyond those present in *Mahan*.

To understand the circumstances under which the Dobson Plan was first formulated, it is important to bear in mind that the District Court was under the gun as far as the 1972 primary and general elections were concerned. The *Paulson II* plan was not voided until May 22, 1972. Because the political process was already under way, the guidelines to the Special Masters were drawn so as to minimize the impact of redistricting on the upcoming 1972 elections. Accordingly, the Commission was directed ". . . to try to conform new legislative districts to the existing districts" (p. A-55, Appendix to Jurisdictional Statement). Bearing in mind that population disparities formed the basis for the Order for reapportionment, except for the peculiar circumstance of the proximity of the 1972 elections, such a guideline would be both contradictory and self-defeating. That the guideline was followed by Special Master Dobson is reflected by his report, which in pertinent part states:

> "The proposed districts conform, both in boundaries and in numbering, quite closely to the existing districts." (p. A3, Appendix to Motion to Affirm)

Infirmities in the Dobson Plan led a majority of the District Court to adopt it on an interim basis for the 1972 election only. The majority said:

> "We approve the Dobson Plan of reapportionment at this time for the 1972 election only. This court retains jurisdiction of this cause for the purpose of adopting a different plan of reapportionment which will not be hampered by considerations of impending elections." *Chapman v. Meier*, 372 F.Supp. 363, 367.

The Court directed the Special Masters to conduct a study to develop a permanent apportionment plan. Concerning that study, the Court stated:

> "The guiding principle of this study, of course, will be the requirements of equal representation mandated by the Fourteenth Amendment to the United States Constitution." *Chapman v. Meier*, 372 F.Supp. 363, 368.

Plaintiffs do not have any quarrel with the original guidelines of the Commission relating to making no substantial changes in the size of the legislature, observing natural geographical barriers, and observing political subdivision lines (p. A-55, Appendix to Jurisdictional Statement). Nor do plaintiffs dispute the additional guidelines set out in the Decision of June 30, 1972, as follows:

> "The Special Masters should give additional consideration to creating legislative districts along the lines suggested in the Ostenson Plan, the boundaries of which should remain as compact as possible while taking into account ease of travel within each district, as well as the substantial identity of economic and social interests among its inhabitants." *Chapman v. Meier*, 372 F.Supp. 363, 367-368.

While all of these guidelines and directives appear appropriate to the work of the Commission, no one of them reflects any statutory or Constitutional state policy. Thus, neither the North Dakota Constitution nor the North Dakota Century Code fixes the size of the legislature or purports to secure the preservation

of political subdivision lines in legislative districting. Accordingly, none of these guidelines are available to the District Court as justification for adoption of the Dobson Plan with its large population disparities among legislative districts. The Decision of January 30, 1974, seeks to justify population variance under the Dobson Plan in these terms:

> "One of the unique features existing in North Dakota is the Missouri River, which separates the state into two parts—two-thirds to the east and one-third to the west. The river traversing the state is crossed by only six highway bridges, four of them located in the area of Williston and Bismarck. This geographical reality, coupled with the difficulty of achieving the goals of observing geographical boundaries and existing political subdivisions, adds to the difficulty of minimizing the variance. That it was substantially accomplished, as illustrated by the chart made a part of this opinion, attests to the validity and soundness of the plan. The population variance between the districts in most cases is only a few hundred people. As a general rule, deviations from the average population decreases if many county lines are violated, and increases if few are split. The effort to preserve urban-rural identities and county lines intact produce the variations which look large percentage wise, but when applied to a sparsely populated state do not result in significant population variances." 372 F.Supp. 371, 377.

In *Mahan v. Howell*, 410 U.S. 315, Virginia was able to justify population variances between districts by directing attention to Virginia Constitutional and statutory provisions establishing state policies relating to the preservation of geographic boundaries and existing political subdivisions. The majority's attempt to justify the Dobson Plan disparities on the basis of *Mahan* ignores the essential distinction that in contrast to Virginia, the State of North Dakota has no Constitutional or statutory policy of preserving geographical boundaries and existing political subdivisions.

The District Court contends that the Missouri River is a major cause of population variance. Concerning the river, Special Master Dobson reported only:

> "The plan observes natural geographic barriers, such as the Missouri River." (p. A4, Appendix to Motion to Affirm)

As a geographic barrier, the Missouri River separates approximately the southwest one-third from the rest of North Dakota. For convenience, legislative districts west and south of the Missouri will be identified as "West River" districts. Under the Dobson Plan, the West River districts are seven (7) in number and are identified as Districts 33 through 39. The number of senators from these districts is seven (7) out of a statewide total of fifty-one (51). The average percentage variance for West River districts from the ideal senate district is ± 4.19% as compared to a ± 5.07 average percentage variance statewide. Neither the most over represented nor the most under represented district included in the Dobson Plan is situated west of the river.

That the Missouri River presents no obstacle whatsoever to fashioning legislative districts of almost mathematical equality is amply demonstrated by the report of Special Master Ostenson accompanying his plan. In pertinent part, the report states:

> "A legislative redistricting plan for North Dakota is submitted herewith for the Court's consideration. Some of the important features of this redistricting plan and the criteria used are as follows:
>
> "(1) The natural boundary imposed by the Missouri River should be recognized and any proposed legislative district should not cross the river.
>
> "(2) The magnitude of the deviation of a district population, above or below the state average, should be kept at a minimum.

"(3) Legislative district boundaries should coincide with political subdivision boundaries to facilitate the work of election officials at election time.

"(4) District compactness and avoiding elongated districts should be considered.

"When criteria one and two above were studied, it became apparent that the number of solutions that could be suggested would be limited. According to the United States Census, there were 86,184 people west and south of the Missouri River in 1970 and 531,577 people east and north of the Missouri River. The total state population was 617,761. Accordingly, the number of legislators in a plan that most nearly equalizes legislative representation statewide is 43 senators and 86 representatives.

"Additional solutions are 50 senators and 100 representatives; or 36 senators and 72 representatives. These three solutions would make it possible to keep the average number of people per senator on both sides of the river at a uniform level.

No. of Senators	**50**[a]	**43**[b]	**36**[c]
Average (West)	12,312	14,364	17,236
Average (East)	12,362	14,367	17,147
Statewide Average	12,355	14,366.5	17,160

"[a] Seven senators west of the Missouri River and forty-three senators east of the river.

"[b] Six senators west of the Missouri River and thirty-seven senators east of the river.

"[c] Five senators west of the Missouri River and thirty-one senators east of the river."

(pp. 12-13, Single Appendix)

Further illustrating that the Missouri River provides no barrier to fashioning legislative districts of equal population, the plan passed by the 1973 North Dakota Legislature, but rejected by a vote of the people, called for fifty (50) state senators, including seven (7) from West River districts. The maximum percentage variation from the ideal as far as West River districts was concerned under the rejected legislative plan was 6.8% —District 31 being under represented by 3.3%, and District 33 being over represented by 3.5%. The average percentage variance under this plan for West River districts was only 1.4%. (See p. A20, Appendix to Motion to Affirm).

To be sure, the Missouri River is a physical barrier of substantial proportion. However, this Court need not determine whether a substantial physical barrier provides independent justification for population variances under a Court-fashioned reapportionment plan. The Court need not resolve the question because as demonstrated by the foregoing, the Missouri River presents no barrier at all to designing legislative districts throughout North Dakota of almost exact mathematical equality.

The report transmitting the Dobson Plan to the District Court contained the following observation:

> "In its order of May 22, 1972, the Court did not address itself to the matter of population deviation. However, I feel that anything in the neighborhood of 1.25-1 is constitutionally permissible in a rural state like North Dakota. It results, in most districts, in a deviation of only a few hundred persons from the mean. Such a ratio probably would be excessive in a large urban state because it would result in deviations running into tens of thousands." (p. A5, Appendix to Motion to Affirm)

That a majority of the Court below ultimately came to accept Mr. Dobson's observation about the relative unimportance of population disparities among legislative districts in rural states

is demonstrated by the following statement in the majority Opinion of January 30, 1974:

> "Where there are identifiable minorities or political groups being forced out of the election process *and* their voting strength is *invidiously* weakened, a plan proper in other respects may require a further examination. As we view the cases, deviations of 16%, 8%, and 10% have recently been allowed in heavily populated states having significant minority populations.
>
> "Even greater deviations are permissible in a sparsely settled state barren of electorally victimized minorities." (Author's Emphasis) *Chapman v. Meier*, 372 F.Supp. 371, 379.

Plaintiffs note that the assertion that deviations among districts may be greater in a sparsely settled state is unaccompanied by citation. In states with relatively small populations, it can be fairly argued that an individual's vote is of greater significance in terms of affecting the outcome of an election than the individual who casts his ballot in a large metropolitan state or district. The Equal Protection Clause principle of "one man, one vote" ought to be equally available to citizens of North Dakota and of New York. While the numbers of people affected by malapportionment in North Dakota may not seem large on a comparative basis, the Court was not dealing with such small numbers of citizens that the shifting of a handful would significantly alter the percentage of population deviation between legislative districts under the Court-fashioned plan.

Nor is the majority's unconcern for variances in a sparsely settled state the only point upon which it can rightfully be faulted. As reflected by the above quotation, the Court also insists that in the absence of electorally victimized minorities, population disparities are not important. That thesis represents a fundamental misconception of the "one man, one vote" prin-

ciple enunciated in *Reynolds v. Sims*, 377 U.S. 533, and subsequent cases. The basic purpose of the rule is to assure that the voting majority will not be victimized by a minority whose votes are accorded greater weight.

The majority's reliance on *Mahan v. Howell*, 410 U.S. 315; *White v. Register*, 412 U.S. 755; *Gaffney v. Cummings*, 412 U.S. 735, and *Swann v. Adams*, 385 U.S. 440 (1967), is entirely misplaced. The population disparities among districts under the Dobson Plan are substantially beyond any heretofore approved and are per se violative of the Equal Protection Clause. In contrast to the cited decisions of this Court, population disparities are not justified on the basis of any unique factors, such as geographic barriers or any discernible policy of the State of North Dakota, Constitutional or statutory. In the absence of such justification, the District Court was obligated to fashion a reapportionment plan upon the standard of a good-faith effort to achieve absolute population equality among the legislative districts.

CONCLUSION

On the basis that the issue of multi-member districts or single-member districts was clearly political, the District Court denied plaintiffs the equitable remedy of single-member districting required under the rule established by *Connor v. Johnson*, 402 U.S. 690. Speaking for the majority in *Gaffney v. Cummings*, 412 U.S. 735, Mr. Justice White observed:

> "The very essence of districting is to produce a different—a more 'politically fair'—result than would be reached with elections at large, in which the winning party would take 100% of the legislative seats. Politics and political considerations are inseparable from districting and apportionment."

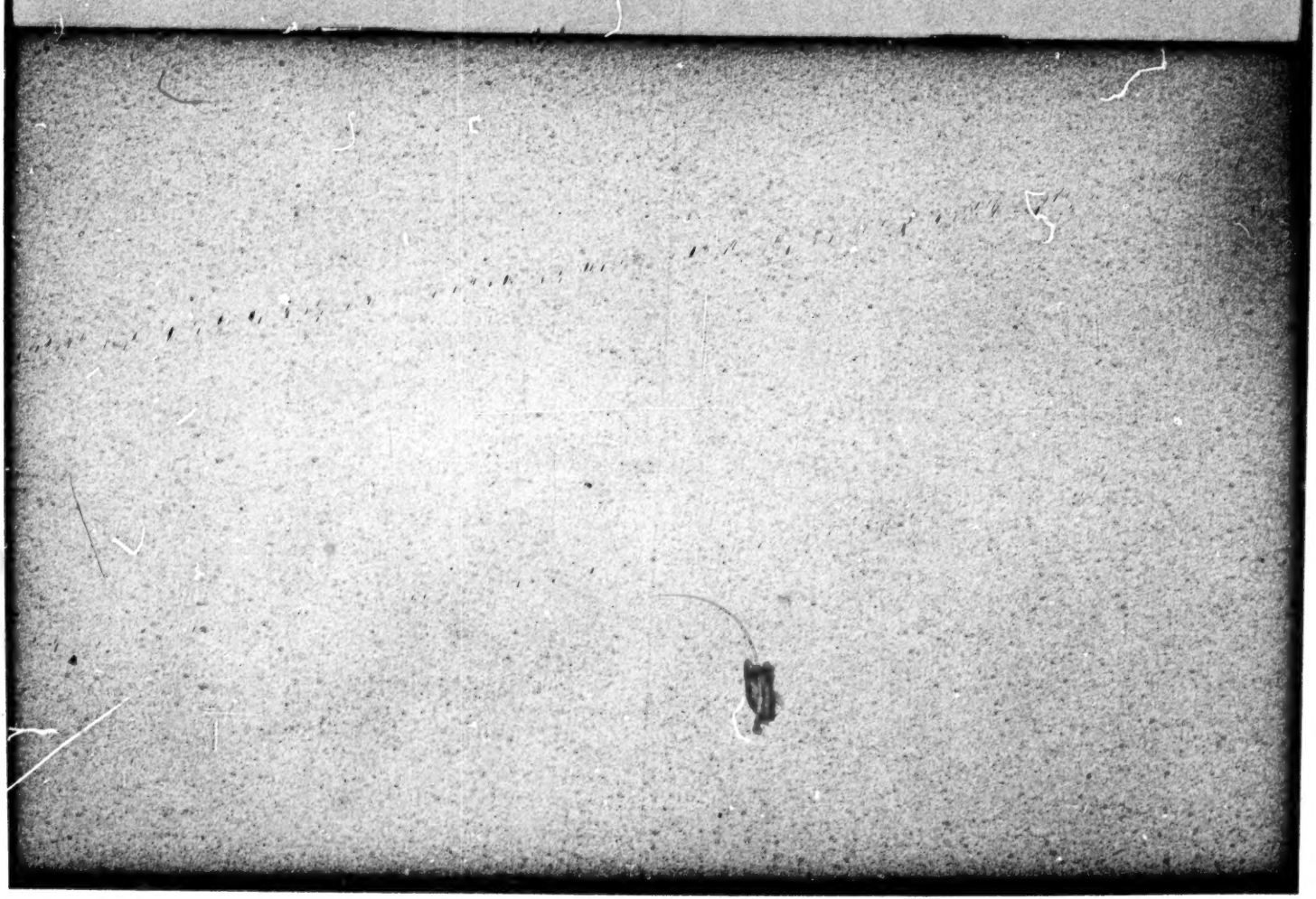
The political ramifications of reapportionment are inescapable whether accomplished by a legislature, commission, or Court. It is a fiction that by denying plaintiffs the "politically fair" remedy of single-member districts, the Court has avoided the political realm. All that it has done is to continue an unjust and unequal system which was originally designed by the Court itself and not by the politicians or the people of North Dakota.

The population deviations among the legislative districts created by the District Court exceed tolerable limits. The Dobson Plan per se offends the Equal Protection Clause. Further, the deviations are not justified by any unique factors, geographic barriers, or any discernible state policy. In lieu of the guiding principle of equal protection, the guiding principle for the Dobson Plan involved the formulation of legislative districts conforming as much as possible to existing districts. Since the existing districts were the creation of the District Court in *Paulson II* back in 1965, and considering that the necessity for redistricting was population disparities revealed by the 1970 census, the "guiding principle" of conforming the new to the old only maintains Constitutionally invalid population disparities among North Dakota legislative districts.

Plaintiffs ask for a reversal of the Judgment rendered January 30, 1974. The case should be remanded to the District Court with directions to fashion a legislative apportionment plan assuring equal representation and providing for single-member senator districts.

Respectfully submitted

JOHN D. KELLY
609½ First Avenue North
Post Office Box 1389
Fargo, North Dakota 58102
Counsel for Appellants



SUPREME COURT, U. S.

FILED

JUL 30 1974

MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1406

DANIEL CHAPMAN and JACQUE STOCKMAN,
Appellants,

vs.

BEN MEIER, Secretary of State for the
State of North Dakota,
Appellee.

APPELLEE'S BRIEF

ALLEN I. OLSON
Attorney General
State of North Dakota

PAUL M. SAND
First Assistant Attorney General
State Capitol
Bismarck, North Dakota 58501
Attorneys for Appellee

R. L. MIDKIFF, Inc., 926 Cherry Street, Kansas City, Mo. 64106, 421-[illegible]080

INDEX

Table of Cases I
Statement 1
Argument—
Multi-Member Districts 2
Variance in Population 4
Conclusion 7
Appendix 1 9
Appendix 2 9
Appendix 3 10
Appendix 4 10
Appendix 5 11
Appendix 6 12

TABLE OF CASES

Connor v. *Johnson*, 29 LEd2d 268, 402 US 690 3
Gaffney v. *Cummings*, 37 LEd2d 298 4
State ex rel. Stockman v. *Anderson*, 184 NW2d 53 2

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1406

DANIEL CHAPMAN and JACQUE STOCKMAN,
Appellants,

vs.

BEN MEIER, Secretary of State for the
State of North Dakota,
Appellee.

APPELLEE'S BRIEF

STATEMENT

In November of 1971, a 1965 District Court-fashioned reapportionment plan was challenged as being no longer valid under the 14th Amendment to the US Constitution in light of the 1970 census. The Court declared the 1965 plan invalid and fashioned a reapportionment plan which is being challenged by the appellants in this appeal on the contention that the Court-fashioned plan contains multi-member districts and that the variance in population is too great.

The appellants' brief adequately sets forth the opinion below, jurisdiction, questions presented, and statements and it would not serve any useful purpose to recite them again, except the questions presented can be restated as follows:

> "The primary question involved here is whether or not the Court-fashioned plan meets the US Constitutional requirements."

ARGUMENT

Multi-Member Districts

Appellants' brief on page nine seems to emphasize that the state has required single member Senate districts, but completely disregards the fact that the state throughout its history provided for multi-member representatives in the House.

The North Dakota Supreme Court in *State ex rel. Stockman* v. *Anderson,* 184 NW2d 53 made a brief summation of the North Dakota history on this subject and on page 57, specifically recognized that the Senate until 1965 was based on area rather than population. The area prior to 1965 consisted of single or multiple county or subdivisions of counties. No part of one county was adjoined to another. The taking of a portion of an area from one county and adding to another county for the purposes of creating a legislative district was not permitted under the earlier provisions of the North Dakota Constitution. Counties in a sense constituted the basic factor in the creation of legislative districts.

Sections 26, 29 and 35 of the North Dakota Constitution have been declared invalid and unconstitutional. Whether the prior provisions were restored or revived is doubtful even though there is some North Dakota case law which would suggest such a concept. The anti-reviving statute 1-02-16 of the North Dakota Century Code in all probability would have no application here. Even if the provisions were revived, which is doubtful, there is a serious question whether they could meet the constitutional standards under the decisions in *Stockman* v. *Anderson,* 184 NW2d 53.

The recent rejection of the constitutional measure (A-9 motion to affirm) which would have provided for

single member districts constitutes legislative direction by the people and would serve as a basis for an exception to the statement in the case of *Connor* v. *Johnson*, 29 LEd2d 268, 402 US 690. Centainly if the Court in the *Connor* case intended to issue a mandate it would have left out the qualifying terms or provisions, "preferable" and "as a general matter" and would have used terms or language which would have left no doubt.

Under the present plan the multi-member legislative districts will elect Representatives and Senators as follows:

District	Senators	Representatives	Population
5	4	8	47,886
18	4	8	50,244
21	5	10	60,240
29	2	4	23,550
32	3	6	35,595

From this it can be seen that the multi-member districts will be able to elect only 18 Senators out of 51, and 36 Representatives out of 102 which equals 35.29%.

There is no evidence in the record which would suggest a need for the creation of single member districts because of any groups or individuals which have or are entitled to special constitutional recognition. In this respect the record is completely void of any reason why single member districts should have been created.

The appellants' only ground or basis for claiming that single member districts should have been created is based on the *Connor* v. *Johnson* decision, but because of the historical background and the rejection of the single member district concept, we believe the lower court was justified in continuing the use of multi-member legislative districts.

Variance in Population

As to population the Supreme Court in *Gaffney* v. *Cummings*, 37 LEd2d 298 contains a very enlightening discussion relating to the census figures and its relation to the weight of a person's vote. The census taking process merely establishes the location of a person at a specific time but it does not nor does it attempt to establish where such persons will vote. It's common knowledge that people do not always vote in the same place where they are located for the purposes of census enumeration. We are satisfied the Court was aware that many persons are located in Burleigh County at the seat of the government in North Dakota and are counted for Burleigh County in the census, but a large number of such persons retain their voting or legal residence in "their home county or precinct". Similarly students attending institutions of higher learning can be located at the school for census purposes whereas in reality many of these students, 18 years or more, vote at the precinct where their parents live and not at the precinct where the school is located.

The constant shifting of population coupled with change in residence sequences for voting purposes (now 30 days in North Dakota for precincts, county and state whereas before it was one year in state, 90 days in county and 30 days in precinct), it is safe to assume that many persons change voting residence more frequently and in greater numbers.

In the final analysis population figures serve only as a basis on which one can make a mere educated guess as where a person might vote which is a critical item in our representative form of government. However, the census data does not provide this information.

North Dakota does not use block voting and any elector in the general election may vote for a candidate of any

party. He may vote for as many candidates as there are positions to be filled.

The trend of the population discloses a decrease and a shift from the rural to urban areas as evidenced by the compilation of census data by the Secretary of State in appendix, page 12, of this brief. Pembina County District 11, is an area which is somewhat different from other areas in the state because of missile base activity which has brought additional persons into that area.

In District 11 (Pembina County) the city of Cavalier grew from 1,381-1970 to 2,433-November 13, 1972, a difference of plus 1,052. The city of Walhalla grew from 1,470 in 1970 to 1,636-October, 1973, a difference of plus 166. District 11 thus had a gain of 1,218 from 1970 to October, 1973, which would reduce the variance to less than two percent (see appendix, pages 9 and 12 of this brief).

In District 16 (part of Walsh) the city of Park River (Walsh County) grew from 1,680 in 1970 to 2,056-June, 1972—a difference of plus 376 which would reduce the variance to 4.4 (see appendix, pages 11 and 12 of this brief).

In District 19 (rural Grand Forks County) the city of Emerado grew from 515 in 1970 to 864—a difference of plus 349 which would reduce the variance to 7.4 (see appendix, page 10, of this brief). District 4 (Burke and Mountrail Counties) has had a decline in population. Burke County went from a high of 9,988 in 1930 to a low of 4,739 in 1970. Mountrail has a different pattern. It went from a high of 13,544 in 1930 down to 9,418 in 1950 up to 10,077 in 1960 with a drop in 1970 to 8,437, the current population (see appendix, page 12, of this brief). We do not have any later figures on other districts.

The growth for Districts 11, 16 and 19 covers only a period of three years at the most. It can be validly argued

that the population increase as of now would be greater and will be substantially greater toward the end of this decennial.

The judges of the District Court as well as the masters could have and in all probability did take judicial notice of the population shift and to a degree made allowances for such shifts.

Keeping in mind the constant shift in population, it suggests that it would be somewhat unrealistic to blindly adhere to precise population distribution among the districts when it is known that such population in reality is no longer accurate or representative.

We are presently approaching the mid term of the decennial census which should clearly advise us that no matter what type of plan adopted now would no longer reflect the current situation where the census figures for 1970 are used.

The appellants reside in District 21 and 32. Neither of these districts are under-represented which raises the serious question whether or not they have any standing to challenge the plan fashioned by the court. They may have a valid standing on question of single or multi-member districts. But the same reason would not apply to the population variance in the districts.

The State of North Dakota has a constitutional provision, Section 25, which will permit the electorate to initiate legislation to reapportion the legislature or for that matter to submit constitutional measures as to how it should be accomplished. This is the procedure which should be followed rather than burden the courts.

CONCLUSION

Finally taking into account the many ingredients which go into the representative form of government, the reapportionment plan fashioned by the Court meets the constitutional requirements and should be affirmed.

ALLEN I. OLSON
Attorney General

PAUL M. SAND
First Assistant Attorney General
Attorneys for Appellee

APPENDIX 1

U.S. DEPARTMENT OF COMMERCE
Social and Economic Statistics Administration
BUREAU OF THE CENSUS
Washington, D.C. 20233

OFFICE OF THE DIRECTOR

DEC 1 1 1972

According to the official count of the returns of the Special Census, the population of the City of Cavalier, Pembina County, North Dakota was 2,433 as of November 13, 1972.

Robert L. Hagan

ROBERT L. HAGAN
Deputy Director
Bureau of the Census

APPENDIX 2

PRESIDENT
GEORGE KAPYAN MAYOR LANGDON

NORTH DAKOTA LEAGUE OF CITIES

BOX 578

BISMARCK, NORTH DAKOTA 58501

ARNE BOYUM EXECUTIVE DIRECTOR
PHONE 701 223 8519

July 23, 1974

Mr. Paul Sand
Assistant Attorney General
Capitol Building
Bismarck, ND 58501

Dear Mr. Sand,

Other than Cavalier, the only city in Pembina County which has something close to a documented population census is the City of Walhalla. The mayor had the city auditor do a census in October of 1973. The census was taken after the 1973 activity had shut down for the year giving them something of a permanent population figure. The population of Walhalla at that time was 1636.

Mayor Leon DuBourt gave the above figure to me as the count arrived at by the city auditor.

Sincerely,

Arne Boyum

Arne Boyum
Executive Director
North Dakota League of Cities

APPENDIX 3

U.S. DEPARTMENT OF COMMERCE
Bureau of the Census
Washington, D.C. 20233

OFFICE OF THE DIRECTOR

JUN 9 1971

According to the official count of the returns of the NINETEENTH CENSUS OF THE UNITED STATES, on file in the Bureau of the Census, the population of Michigan City, Nelson County, North Dakota was 478 as of April 1, 1970.

CONRAD TAEUBER
Associate Director
Bureau of the Census

APPENDIX 4

U.S. DEPARTMENT OF COMMERCE
Bureau of the Census
Washington, D.C. 20233

OFFICE OF THE DIRECTOR

NOV 29 1971

According to the official count of the returns of the Special Census, the population of the City of Grand Forks, Grand Forks County, North Dakota was 40,060 as of October 7, 1971.

CONRAD TAEUBER
Associate Director
Bureau of the Census

U.S. DEPARTMENT OF COMMERCE
Bureau of the Census
Washington, D.C. 20233

OFFICE OF THE DIRECTOR

DEC 13 1971

According to the official count of the returns of the Special Census, the population of the City of Emerado, Grand Forks County, North Dakota was 864 as of December 7, 1971.

CONRAD TAEUBER
Associate Director
Bureau of the Census

APPENDIX 5

U.S. DEPARTMENT OF COMMERCE
Social and Economic Statistics Administration
BUREAU OF THE CENSUS
Washington, D.C. 20233

OFFICE OF THE DIRECTOR

JUL 26 1972

According to the official count of the returns of the Special Census, the population of the city of Park River, Walsh County, North Dakota was 2,056 as of June 19, 1972.

CONRAD TAEUBER
Associate Director
Bureau of the Census

U.S. DEPARTMENT OF COMMERCE
Bureau of the Census
Washington, D.C. 20233

OFFICE OF THE DIRECTOR

SEP 22 1971

According to the official count of the returns of the Special Census, the population of Lakota, Nelson County, North Dakota was 1,144 as of August 3, 1971.

CONRAD TAEUBER
Associate Director
Bureau of the Census

POPULATION—NORTH DAKOTA

City, Town or Village (Incorporated)	1970	1960	1950	1940	1930	1920	1910
Newburg	125	158	105	119	87	110	102
New England	905	1,095	1,117	895	911	613	
New Leipzig	354	390	447	366	443	378	
New Rockford	1,909	2,177	2,185	2,017	2,195	2,111	
New Salem	943	986	942	875	804	711	621
New Town	1,428	1,586					
Niagara	115	157	163	179	207	199	167
Nome	163	145	217	277	218	267	218
Noonan	493	625	551	520	423	376	153
Northwood	1,139	1,195	1,182	1,063	971	935	769
Oakes	1,742	1,650	1,774	1,665	1,709	1,627	1,499
Oberon	151	248	238				
Omemee	5	11	60	123	170	222	332
Oriska	128	145	135	217	183	300	
Osnabrock	295	289	284	269	244	310	253
Overly	28	65	90	125	154	193	182
Page	367	432	462	428	443	452	479
Palermo	146	188	150	178	205	179	177
Park River	1,680	1,813	1,692	1,408	1,131	1,114	1,008
Parshall	1,246	1,216	935	870	670	376	
Pekin	120	180	221	229	210	197	
Pembina	741	625	640	703	551	802	717
Perth	44	73	124	145	153	218	221
Petersburg	266	272	318	295	310	367	353
Pettibone	173	205					
Pick City	139	191	294				
Pillsbury	59	76	119	161	260	142	
Pingree	78	151	161	167	266	286	
Pisek	184	176	216	242	225	300	312
Plaza	295	386	389	360	409	345	285
Portal	281	351	409	499	512	545	491
Portland	534	606	641	561	600	623	56.
Powers Lake	523	633	565	464	382	261	
Rawson	10	22	72	92			
Ray	776	1,049	721	579	621	563	436
Reeder	306	321	339	263	295	258	198
Regan	74	144	129	149	162	202	
Regent	344	388	405	261	309	262	
Reynolds	236	269	285	315	351	389	412
Rhame	206	254	240	243	356	302	
Richardton	799	792	721	682	710	626	647
Riverdale		1,055					
Robinson	125	155	166	160	185		
Rock Lake	270	300	285	248	279	238	194
Rogers	98	119	150	174	169	173	
Rolette	579	524	451	460	428	409	408
Rolla	1,502	1,395	1,176	1,008	852	676	587
Rosa	125	167					
Rugby	2,889	2,972	2,907	2,218	1,612	1,424	1,030
Ruso	15	31	37	65	104	120	141
Russell	14	26	61	70	94	119	161
Rutland	425	308	309	305	264	291	324
Ryder	211	264	320	467	467	483	338
St. John	367	420	451	417	372	460	424
St. Thomas	508	660	566	503	595	500	513
Sanborn	255	263	324	366	343	391	390
Sanish	75	63	607	455	468	337	
Sarles	148	225	286	302	283	348	246
Sawyer	373	390	284	271	296	241	327
Scranton	360	358	360	277	361	363	214
Selfridge	346	371	343	329	351	153	
Sentinel Butte	125	160	229	256	219	292	
Sharon	201	251	312	371	328	362	304
Sheldon	192	221	267	281	327	321	358
Sherwood	369	360	421	390	455	423	328
Sheyenne	362	423	469	431	417		
Sibley	20	22					
Solen	190						
Souris	151	213	206	259	248	269	267
South Heart	132						
So. West Fargo		3,328	1,032	707			
Springbrook	27	35	51	77	105	93	
Stanley	1,581	1,795	1,486	1,058	936	591	518
Stanton	517	409	571	370	358	325	
Starkweather	193	323	229	295	312	302	246
Steele	696	847	762	721	619	650	500
Strasburg	642	612	733	934	695	663	575
Streeter	324	491	602	647	711	640	
Surrey	361	309					
Sykeston	232	226	272	272	327	367	276
Tagus	14	72	101	140	136	132	105
Tappen	294	326	379	323	368	182	

POPULATION—NORTH DAKOTA

City, Town or Village (Incorporated)	1970	1960	1950	1940	1930	1920	1910
Taylor	162	216	258	251	263	285	
Thompson	891	911	870	876	773		
Thorne			37	45	38	78	105
Tioga	1,667	2,087	456	385	435	320	203
Tolley	162	189	249	177	225	325	240
Tolna	247	291	281	172	174	199	209
Tower City	289	300	292	364	435	447	452
Towner	870	946	956	918	622	610	691
Turtle Lake	713	792	839	632	579	595	
Tuttle	216	255	368	357	383	321	
Underwood	781	819	1,061	613	488	452	422
Upham	272	333	403	243	257	196	206
Valley City	7,843	7,809	6,851	5,917	5,268	4,681	4,606
Van Hook			380	329	372	331	
Velva	1,341	1,320	1,170	1,017	870	836	837
Venturia	77	148	190	257	233	201	
Verona	140	162	139	201	222	258	236
Voltaire	56	70	72	101	61		
Wabek		14	15	18	16	40	
Wahpeton	7,076	5,876	5,125	3,747	3,176	3,069	2,467
Wales	119	151	235				
Walhalla	1,471	1,442	1,463	1,138	700	734	592
Warwick	168	204	155	224	249	250	
Washburn	804	993	913	901	753	556	657
Watford City	1,766	1,565	1,371	1,073	769	760	
Werner	21	59	63	137	213	198	
West Fargo	5,161	93	159	117			
West Fargo Industrial Park	104						
Westhope	705	824	576	460	521	439	592
Wheelock	21	82	101	94	115		
White Earth	128	208	218	272	240	247	264
Wildrose	235	361	430	472	518	449	
Williston	11,280	11,866	7,378	5,790	5,106	4,178	3,124
Willow City	403	496	595	524	577	559	623
Wilton	695	739	796	851	1,001	1,026	437
Wimbledon	337	402	449	357	421	521	571
Wing	223	303	312	235	237		
Winnek	1,275	1,290	1,241	1,112	1,146	1 003	432
Woburn			17	19			
Wolford	81	126	140	206			
Woodworth	139	221	267	245	261	297	
Wyndmere	516	644	627	499	521	170	439
York	102	148					
Zap	271	324	425	524	496	257	
Zeeland	313	427	484	489	418	323	193

COMMERCIAL PRINTING CO. BDM 12-71

Issued By
BEN MEIER
Secretary of State

Bismarck, N. D.

NORTH DAKOTA
POPULATION
Federal Census
1910 - 1970

COUNTY	Population 1970	1960	1950	1940	1930	1920	1910
Adams	3,832	4,449	4,910	4,664	6,343	5,593	5,407
Barnes	14,969	16,749	16,884	17,814	18,804	18,678	18,066
Benson	8,243	9,436	10,675	12,629	13,227	13,095	12,681
Billings	1,198	1,513	1,555	2,231	740	2,126	*10,186
Bottineau	9,496	11,315	12,160	13,253	14,853	15,169	17,295
Bowman	3,901	4,154	4,801	3,860	5,119	4,768	4,664
Burke	4,739	5,886	6,621	7,653	9,998	9,511	9,064
Burleigh	60,714	54,010	25,672	22,256	19,749	15,578	13,087
Cass	73,653	66,947	58,877	52,949	49,735	41,477	32,935
Cavalier	8,213	10,064	11,840	13,923	14,554	15,555	15,639
Dickey	6,976	8,147	9,121	9,696	10,877	10,499	9,839
Divide	4,564	5,566	5,967	7,086	9,636	9,637	6,015
Dunn	4,895	6,350	7,212	8,376	9,566	8,828	6,362
Eddy	4,103	4,536	5,372	5,741	6,346	6,493	4,930
Emmons	7,200	8,462	9,715	11,699	12,467	11,288	8,796
Foster	4,832	5,361	5,337	5,824	6,353	6,108	5,313
Golden Valley	2,611	3,100	3,499	3,498	4,122	4,832	
Grand Forks	61,102	48,677	39,442	31,518	31,956	29,795	27,889
Grant	5,009	6,248	7,114	8,264	10,104	9,552	
Griggs	4,184	5,023	5,460	5,818	6,589	7,402	6,274
Hettinger	5,975	6,317	7,100	7,457	8,796	7,686	6,557
Kidder	4,962	5,386	6,169	6,692	8,031	7,798	5,962
LaMoure	7,117	8,705	9,498	10,298	11,517	11,564	10,724
Logan	4,285	5,369	6,357	7,561	8,089	7,723	6,165
McHenry	8,977	11,899	12,556	14,034	15,439	15,544	12,837
McIntosh	5,545	6,702	7,590	8,984	9,621	9,010	7,351
McKenzie	6,127	7,296	6,849	5,426	9,769	9,564	5,720
McLean	11,286	14,030	16,824	16,682	17,991	17,266	14,496
Mercer	6,175	6,805	8,676	9,411	9,516	8,224	4,747
Morton	20,310	20,992	19,294	20,184	19,647	18,714	15,289
Mountrail	7,437	10,077	9,418	10,442	13,544	12,140	8,491
Nelson	5,776	7,024	8,090	9,129	10,203	10,362	10,140
Oliver	2,322	2,610	3,091	3,859	4,262	4,425	3,577
Pembina	10,774	12,546	13,990	15,671	16,757	15,177	14,749
Pierce	6,323	7,394	8,226	9,208	9,074	9,283	9,740
Ramsey	12,945	13,443	14,373	15,626	16,252	15,427	15,199
Ransom	7,102	8,078	8,876	10,041	10,983	11,618	10,345
Renville	3,553	4,698	5,405	5,833	7,263	7,778	7,840
Richland	18,009	18,824	19,865	20,519	21,008	20,887	19,659
Rolette	11,549	10,641	11,102	12,583	10,760	10,061	9,858
Sargent	6,527	6,856	7,616	8,692	9,298	9,655	9,502
Sheridan	3,322	4,350	5,253	6,616	7,373	7,935	8,103
Sioux	3,642	3,662	3,896	4,419	4,687	3,308	
Slope	1,454	1,893	2,315	2,932	3,150	4,940	
Stark	19,613	18,451	16,137	15,414	16,540	13,542	12,504
Steele	3,749	4,719	5,145	6,193	6,972	7,401	7,616
Stutsman	22,590	25,137	24,158	23,496	26,100	24,575	18,189
Towner	4,945	5,624	6,360	7,200	8,393	8,327	8,963
Traill	9,571	10,583	11,359	12,300	12,600	12,210	12,545
Walsh	16,751	17,997	18,859	20,747	20,047	19,078	19,491
Ward	58,560	47,072	34,782	31,981	33,587	28,811	25,281
Wells	7,947	9,237	10,417	11,198	13,285	12,957	11,814
Williams	19,301	22,051	16,442	14,315	13,553	12,960	14,234
State Total	617,761	632,446	619,636	641,935	680,845	646,872	577,056

*Includes present Golden Valley and Slope Counties still a part of Billings County in 1910.

"Buy North Dakota Products"

12

APPENDIX 6

POPULATION—NORTH DAKOTA

City, Town or Village (Incorporated)	1970	1960	1950	1940	1930	1920	1910
Abercrombie	262	244	244	216	242	266	295
Adams	284	350	411	355	345	404	388
Alamo	134	182	192	214	211	...	...
Alexander	208	269	302	415	386	...	...
Alice	85	124	162	181	169	...	...
Almont	109	190	200	234	...	...	...
Alsen	201	228	114	312	268	...	...
Ambrose	109	220	280	294	334	389	330
Amenia	80	117	127	104	96	...	...
Amidon	4	84	82	102	141	146	...
Anamoose	301	503	642	478	495	665	669
Aneta	376	481	469	509	568	665	654
Antler	155	310	317	354	318	305	342
Ardoch	70	106	137	119	110	153	271
Argusville	118	118	126	145	118	...	...
Arnegard	161	228	206	232	254	...	...
Arthur	135	225	280	235	232	...	...
Ashley	1,126	1,469	1,422	1,345	1,033	1,009	682
Ayr	48	81	104	107	106	...	...
Balfour	93	159	162	193	197	322	399
Balta	134	162	168	163	...	...	...
Bantry	80	66	126	...	...	...	...
Barney	53	116	...	...	...	...	...
Bartlett	39	59	61	78	67	98	126
Batavia	53	80	102	157	170	158	202
Bathgate	178	176	209	312	292	362	328
Beach	1,124	1,460	1,461	1,178	1,267	1,106	1,062
Belfield	1,126	1,064	1,051	870	653	526	...
Benedict	72	129	127	167	145	196	...
Bergen	24	52	56	87	80	...	...
Berlin	78	78	124	132	135	130	127
Berthold	399	431	459	426	511	458	464
Berwick	73	86	71	92	...	...	...
Beulah	1,314	1,314	1,501	947	913	552	...
Big Bend	...	39	207	...	...	...	...
Binford	142	261	309	311	317	393	376
Bisbee	381	388	361	391	417	500	446
Bismarck	34,703	27,670	18,640	15,496	11,090	7,122	5,443
Bottineau	2,617	2,617	2,268	1,739	1,322	1,172	1,331
Bowbells	763	887	806	767	765	643	651
Bowdon	259	259	248	348	303	306	292
Bowman	1,730	1,730	1,382	967	888	767	491
Braddock	141	176	185	193	216	205	...
Brinsmade	110	110	136	206	199	191	203
Brocket	94	163	212	291	276	240	196
Bucyrus	41	69	111	117	124	178	...
Buffalo	234	234	261	245	242	268	241
Burlington	262	262	...	...	...	...	...
Butte	157	257	272	261	231	...	...
Buxton	321	321	387	404	410	...	...
Calio	29	101	102	98	152	132	...
Calvin	104	104	132	...	...	...	...
Cando	1,466	1,566	1,550	1,282	1,164	1,111	1,332
Canton	130	130	139	148	126	101	116
Carbin	198	198	194	222	244	244	257
Carrington	2,438	2,438	2,101	1,850	1,717	1,452	1,217
Carson	501	501	493	473	356	277	...
Casselton	1,894	1,894	1,873	1,368	1,253	1,528	1,553
Cathay	110	110	209	189	235	185	226
Cavalier	1,423	1,423	1,469	1,105	950	819	652
Cayuga	195	195	178	196	219	192	176
Center	476	476	492	509	593	...	...
Churchs Ferry	169	161	123	144	295	353	467
Cleveland	169	169	181	246	273	341	...
Clifford	109	109	158	...	...	...	...
Cogswell	365	365	393	78	426	445	418
Colfax	98	98	...	...	...	...	...
Columbus	469	672	525	508	516	72	226
Conway	57	67	107	120	100	8	194
Cooperstown	1,489	1,424	1,189	1,077	1,053	1,0	1,019
Courtenay	144	168	238	297	360	340	539
Crary	199	195	235	267	278	307	279
Crocus	...	...	...	...	35	37	...
Crosby	1,759	1,689	1,404	1,271	1,147	1,147	706
Crystal	372	372	439	428	314	349	376
Davenport	142	143	150	147	205	214	226
Dawson	264	264	240	263	306	293	...
Daysy	216	216	196	216	281	293	266
Deering	119	117	136	148	192	142	150
Des Lacs	197	185	180	197	205	188	...
Devils Lake	7,018	8,299	8,427	6,204	5,519	5,110	5,187

POPULATION—NORTH DAKOTA

City, Town or Village (Incorporated)	1970	1960	1950	1940	1930	1920	1910
Dickey	118	143	165	203	168	190	187
Dickinson	12,905	9,971	7,469	5,839	5,025	4,123	2,678
Dodge	121	226	251	234	204	173	...
Dogden	...	...	...	...	...	262	320
Donnybrook	163	196	207	215	259	267	297
Douglas	214	219	236	313	248	284	171
Drake	636	752	831	654	544	517	348
Drayton	1,035	940	876	688	602	637	587
Dunn Center	307	350	346	338	276	317	...
Dunseith	811	1,017	713	719	484	374	478
Dwight	94	101	129	168	104	139	...
East Fairview	...	...	...	...	155	176	...
Eckman	9	8	55	66	79	64	84
Edgeley	888	892	943	803	821	803	306
Edinburg	315	330	343	378	284	278	300
Edmore	396	405	468	452	396	501	344
Egeland	96	190	248	276	333	306	266
Elgin	839	944	882	883	805	429	...
Ellendale	1,957	1,800	1,759	1,517	1,264	1,334	1,389
Elliot	58	62	87	118	106	...	...
Emerado	315	328	...	...	...	...	...
Enderlin	1,111	1,596	1,504	1,593	1,439	1,919	1,540
Epping	160	153	158	154	183	116	...
Esmond	410	420	475	449	313	513	535
Fairdale	117	126	131	187	171	192	160
Fairmount	413	503	600	705	611	706	367
Fargo	...	46,662	38,256	32,580	28,619	21,961	14,331
Fessenden	815	920	917	902	738	731	713
Fingal	168	190	210	300	324	...	...
Finley	959	808	671	677	587	599	616
Flasher	486	518	413	387	346	287	...
Flaxton	285	375	436	362	423	374	391
Forbes	138	138	204	268	265	293	321
Fordville	341	367	376	439	442	320	...
Forest River	161	191	236	207	198	226	232
Forman	596	630	466	500	386	402	352
Fort Clark	...	...	...	...	...	86	...
Fort Yates	1,153	...	...	...	...	...	...
Fortuna	208	185	181	214	196	198	...
Fredonia	109	141	268	209	394	296	...
Fullerton	139	141	206	184	206	262	266
Gackle	450	522	504	537	493	424	...
Galesburg	191	166	169	...	...	...	...
Gardena	94	113	116	125	120	99	119
Gardner	106	107	136	103	108	...	...
Garrison	1,401	1,794	1,899	1,117	1,024	714	408
Gascoyne	41	59	76	48	97	60	...
Gilby	...	281	...	...	...	...	...
Gladstone	87	185	224	278	...	...	...
Glenburn	363	363	281	190	263	228	268
Glenfield	127	129	...	...	...	...	...
Glen Ullin	1,210	1,210	1,324	976	950	875	921
Golden Valley	286	286	239	400	294	369	...
Goliva	164	162	174	...	...	...	...
Goodrich	392	392	448	476	468	476	410
Grafton	6,888	6,988	4,901	4,070	3,134	2,512	2,229
Grand Forks AFB	...	...	...	...	...	...	...
Grand Forks	34,451	39,436	26,226	20,228	17,112	14,010	12,478
Grandin	147	156	158	172	...	...	...
Graner	14	27	57	112	...	...	...
Granville	400	404	447	450	394	455	...
Great Bend	164	169	195	169	142	197	...
Gretora	444	525	425	482	358	...	...
Gwinner	243	197	...	...	...	...	...
Hagne	197	228	442	364	315	183	...
Halliday	592	477	395	305	289	...	...
Hamberg	64	124	164	187	...	...	...
Hamilton	217	241	255	151	200	213	...
Hampden	71	71	203	197	222	199	...
Hankinson	1,285	1,409	1,429	1,460	1,477	1,603	...
Hanks	78	115	192	213	...	...	...
Hannaford	277	313	405	351	431	340	...
Hannah	253	257	261	262	...	...	...
Hanoboro	143	134	196	176	218	...	...
Harvey	2,365	2,327	1,851	2,157	1,590	1,443	...
Hatton	856	891	933	804	828	666	...
Havana	206	267	265	271	319	387	...
Haynes	111	145	210	167	113	...	...
Haseltun	451	453	500	446	382	...	...
Hazen	1,222	1,230	662	689	620	...	...
Hebron	1,340	1,412	1,267	1,348	1,374	597	...
Hettinger	1,769	1,762	1,138	1,292	817	766	...

POPULATION—NORTH DAKOTA

City, Town or Village (Incorporated)	1970	1960	1950	1940	1930	1920	1910
Hillsboro	1,309	1,278	1,331	1,338	1,317	1,183	1,237
Hoople	330	324	447	346	325	250	175
Hope	364	390	470	474	585	699	909
Horace	276	178	190	...	...	...	...
Hunter	362	448	417	414	406	494	366
Hurdsfield	139	183	223	258	256	...	...
Inkster	198	282	304	310	257	368	353
Jamestown	15,385	15,163	10,697	8,790	8,187	6,627	4,358
Jud	110	156	175	202	140	178	99
Karlsruhe	172	221	242	289	258	...	...
Kathryn	109	142	200	229	274	289	...
Kenmare	1,937	1,696	1,712	1,528	1,494	1,446	1,437
Kensal	263	334	376	356	420	415	456
Kermit	...	...	...	53	26	37	106
Kief	48	97	135	159	139	207	...
Killdeer	615	765	698	650	495	512	...
Kindred	695	580	504	450	429	334	...
Knox	104	122	190	189	177	173	330
Kramer	125	175	198	220	190	172	191
Kulm	625	664	767	734	742	725	648
Lakota	1,144	1,066	1,032	907	860	959	1,023
LaMoure	951	1,068	1,010	990	889	1,014	929
Landa	61	110	132	149	140	...	...
Langdon	3,923	2,151	1,838	1,646	1,221	1,228	1,214
Lankin	221	302	287	283	247	334	341
Lansford	298	382	352	360	383	357	456
Larimore	1,469	1,714	1,374	1,232	978	1,089	1,274
Larson	35	62	59	79	89	114	...
Lawton	123	159	211	210	253	227	...
Leal	70	70	79	102	105	88	41
Leeds	626	797	778	782	735	704	682
Lehr	297	381	394	536	458	362	182
Leith	92	110	160	166	174	158	...
Leonard	233	232	...	...	...	...	...
Lidgerwood	1,096	1,081	1,147	1,042	1,029	1,065	1,019
Lignite	358	358	230	235	217	214	...
Linton	1,695	1,626	1,675	1,602	1,192	1,011	644
Lisbon	2,698	2,093	2,021	1,997	1,650	1,855	1,758
Litchville	278	345	408	430	410	598	484
Lorma	59	50	53	256	293	...	...
Loraine	48	54	70	74	92	74	...
Ludden	48	59	96	150	164	132	109
Luverne	98	109	154	197	227	226	...
McClusky	699	751	850	924	719	646	517
McHenry	132	155	180	250	219	299	398
McVille	583	551	626	548	513	546	310
Maddock	740	740	691	651	557	574	574
Makoti	359	214	219	212	278	...	...
Mandan	11,093	10,525	7,298	6,685	5,037	4,336	3,872
Manfred	36	98	138	...	...	...	...
Manvel	363	313	278	209	183	...	...
Mapleton	219	180	169	180	195	198	207
Marion	252	309	298	242	258	294	241
Marmarth	247	319	469	656	721	1,318	790
Martin	120	146	171	228	211	...	...
Max	391	410	465	423	500	473	285
Maxbass	174	218	259	215	217	147	240
Mayville	2,264	2,168	1,790	1,351	1,199	1,218	1,070
Maza	29	31	82	66	70	...	...
Medina	456	545	564	560	497	415	347
Medora	120	123	...	...	...	...	...
Menoken	150	154	214	...	...	...	...
Merricourt	72	86	105	153	120	70	75
Michigan City	478	451	496	451	433	491	419
Milnor	615	658	674	677	564	680	641
Milton	398	364	322	310	329	393	416
Minnewaukan	466	428	503	621	586	564	510
Minot	32,290	30,604	22,032	16,577	16,098	10,476	6,188
Minot Base	12,072	...	...	...	...	...	...
Minto	636	642	592	630	585	602	701
Mohall	960	956	1,073	687	676	651	482
Monango	112	133	138	175	211	231	178
Montpelier	158	97	105	133	165	146	...
Mooreton	158	164	161	146	147	123	...
Mott	1,185	1,463	1,583	1,220	1,038	723	...
Mountain	146	214	218	205	...	...	...
Munich	249	213	248	216	260	248	...
Mylo	51	103	110	85	134	140	98
Napoleon	1,036	1,078	1,070	982	709	854	...
Neche	452	546	615	565	502	528	539
Nekoma	94	143	140	194	191	189	156

(Slip Opinion)

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Lumber Co.*, 200 U.S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

CHAPMAN ET AL. *v.* MEIER, SECRETARY OF STATE OF NORTH DAKOTA

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NORTH DAKOTA

No. 73-1406. Argued November 13, 1974—
Decided January 27, 1975

This case involves the issue of the constitutionality of a federal-court-ordered reapportionment of the North Dakota Legislative Assembly. Following protracted state and federal litigation challenging various apportionment plans, statutes, and state constitutional provisions, including a federal action in which a three-judge District Court in 1965 approved a reapportionment plan that included five multimember senatorial districts, appellants brought the present federal action against appellee, the Secretary of State, alleging that substantial population shifts had occurred and that the 1965 plan no longer met equal protection requirements, and requesting the court to order apportionment based on the 1970 census figures, to provide for single-member districts, to declare the 1965 plan invalid, and to restrain appellee from administering the election laws under that plan. A three-judge District Court, holding that such plan failed to meet constitutional standards, approved another plan that called for five multimember senatorial districts and that contained a 20% population variance between the largest and smallest senatorial districts. *Held:*

1. This Court has jurisdiction of the appeal under 28 U. S. C. § 1253. Although the challenged reapportionment plan was court ordered, its enforcement is based on the State's Constitution and statutes, its effectuation directly depends on the state election law machinery, and the plan itself is a court-imposed replacement of state constitutional provisions and reapportionment statutes. Pp. 11–12.

2. Absent persuasive justification, a federal district court in ordering state legislative reapportionment should refrain from

Syllabus

imposing multimember districts upon a State. Here the District Court has failed to articulate a significant state interest supporting its departure from the general preference for single-member districts in court-ordered reapportionment plans that this Court recognized in *Connor* v. *Johnson*, 402 U. S. 690, and unless the District Court can articulate such a "singular combination of unique factors" as was found to exist in *Mahan* v. *Howell*, 410 U. S. 315, 333, or unless the 1975 Legislative Assembly appropriately acts, the court should proceed expeditiously to reinstate single-member senate districts. Pp. 12–20.

3. A population deviation of such magnitude in a court-ordered reapportionment plan as the 20% variance involved here is constitutionally impermissible absent significant state policies or other acceptable considerations requiring its adoption. The burden is on the District Court to elucidate the reasons necessitating any departure from approximate population equality and to articulate clearly the relationship between the variance and the state policy furthered. Here the District Court's allowance of the 20% variance is not justified, as the court claimed, by the absence of "electorally victimized minorities," by the sparseness of North Dakota's population, by the division of the State caused by the Missouri River, or by the asserted state policy of observing geographical boundaries and existing political subdivisions, especially when it appears that other, less statistically offensive, reapportionment plans already devised are feasible. Pp. 20–25.

372 F. Supp. 371, reversed and remanded.

BLACKMUN, J., delivered the opinion for a unanimous Court.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D.C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 73–1406

Daniel Chapman and Jacque Stockman, Appellants, *v.* Ben Meier, etc.

On Appeal from the United States District Court for the District of North Dakota.

[January 27, 1975]

MR. JUSTICE BLACKMUN delivered the opinion of the Court.

This case presents the issue of the constitutionality of a federal-court-ordered apportionment of the North Dakota Legislature. That State, like many others, has struggled to satisfy constitutional requirements for legislative apportionment delineated in *Baker* v. *Carr*, 369 U. S. 186 (1962); *Reynolds* v. *Sims*, 377 U. S. 533 (1964); *WMCA, Inc.* v. *Lomenzo*, 377 U. S. 633 (1964); *Maryland Committee* v. *Tawes*, 377 U. S. 656 (1964); *Davis* v. *Mann*, 377 U. S. 678 (1964); *Roman* v. *Sincock*, 377 U. S. 695 (1964); *Lucas* v. *Colorado General Assembly*, 377 U. S. 713 (1964); and other cases. This litigation is the culmination of that struggle, totally ineffectual on the legislative side, during the past decade.

I

The State's Constitution and its Statutes

North Dakota's original Constitution, adopted at the State's admission into the Union in 1889, is still in effect. It has been amended, of course, from time to time. Since 1918, § 25 thereof has read: "The legislative power of this state shall be vested in a legislature consisting of a

senate and a house of representatives." N. D. Const. Art. II, § 25, 13 N. D. C. C., p. 141 (1960), and 1973 Supp., p. 13. That legislative power for 70 years has been subject to the initiative and the referendum. *Ibid.* The Constitution has further provided that the State's Senate "shall be composed of forty-nine members," § 26, elected for a four-year term, § 27, with one-half thereof elected each two years, § 30, and that no one shall be a Senator unless he is a qualified elector of the senatorial district, has attained the age of 25 years, and has been a resident of the State for the two years next preceding the election, § 28. Since 1960, § 29 has read:

> "Each existing senatorial district as provided by law at the effective date of this amendment shall permanently constitute a senatorial district. Each senatorial district shall be represented by one senator and no more."[1] Laws 1959, c. 438; Laws 1961, c. 405.

The document also states that the House of Representatives "shall be composed of not less than sixty, nor more than one hundred forty members," § 32, elected for a two-year term, § 33, and that no one shall be a representative unless he is a qualified elector of the district, has attained the age of 21 years, and has been a resident of the State for the two years next preceding the election, § 34. Section 35 provides for at least one representative

---

[1] Prior to the 1960 amendment, § 29 read:

"The legislative assembly shall fix the number of senators, and divide the state into as many senatorial districts as there are senators, which districts, as nearly as may be, shall be equal to each other in the number of inhabitants entitled to representation. Each district shall be entitled to one senator and no more, and shall be composed of compact and contiguous territory; and no portion of any county shall be attached to any other county, or part thereof, so as to form a district. The districts as thus ascertained and determined shall continue until changed by law."

for each senatorial district and for as many representatives as there are counties in the district; states that the Legislative Assembly, after each federal decennial census, shall apportion "the balance of the members of the House of Representatives," and, when the Legislative Assembly fails in its apportionment duty, places the task of apportioning the House in a designated group of officials of the State.[2]

There have been complementary statutory provisions. An apportionment effected by Laws 1931, c. 7, 10

[2] Section 35 reads in full as follows:

"Each senatorial district shall be represented in the House of Representatives by at least one representative except that any senatorial district comprised of more than one county shall be represented in the House of Representatives by at least as many representatives as there are counties in such senatorial district. In addition the Legislative Assembly shall, at the first regular session after each federal decennial census, proceed to apportion the balance of the members of the House of Representatives to be elected from the several senatorial districts, within the limits prescribed by this Constitution, according to the population of the several senatorial districts. If any Legislative Assembly whose duty it is to make an apportionment shall fail to make the same as herein provided it shall be the duty of the chief justice of the supreme court, attorney general, secretary of state, and the majority and minority leaders of the House of Representatives within ninety days after the adjournment of the legislature to make such apportionment and when so made a proclamation shall be issued by the chief justice announcing such apportionment which shall have the same force and effect as though made by the Legislative Assembly."

Prior to the 1960 amendment, § 35 called for the Legislative Assembly (seemingly at least every 10 years) "to fix by law" the number of senators and the number of representatives "within the limits prescribed by this constitution" and to "proceed to reapportion the state into senatorial districts as prescribed by this constitution, and to fix the number of members of the house of representatives to be elected from the several senatorial districts," with the proviso that at any regular session "the legislative assembly may . . . redistrict the state into senatorial districts, and apportion the senators and representatives respectively."

N. D. C. C. § 54–03–01 (1960 ed.), was in effect for over 30 years despite the mandate of § 35 of the Constitution that apportionment be effected after each federal census.

II

Prior Litigation

A. Things began to stir in North Dakota even prior to this Court's decision in *Baker* v. *Carr* in 1962. The State's Legislative Assembly of 1961 had failed to apportion the House following the 1960 census. After *Baker* had been decided at the District Court level, 179 F. Supp. 824 (MD Tenn. 1959), and between the argument and reargument of the case here, the Supreme Court of North Dakota dismissed an original action for a prerogative writ to enjoin its Chief Justice from issuing the apportionment proclamation which would have announced the conclusions of the statutorily designated "apportionment group" that were then anticipated. The petition asserted that the group's plan would apportion the House in an unconstitutional manner and not according to population. The Supreme Court ruled that the function of the group was legislative; that it had not yet completed its work; that it was performing a function the Legislative Assembly should have performed; and that, until the proclamation was issued, the group's action was not subject to challenge in the courts. *State ex rel. Aamoth* v. *Sathre,* 110 N. W. 2d 228 (1961).

B. Citizens of North Dakota then sought declaratory and injunctive relief in federal court under the Civil Rights Acts, 42 U. S. C. §§ 1983 and 1988. By this time the State's Chief Justice had issued the proclamation. A three-judge District Court held that the presence of the proclamation eliminated the aspect of prematurity that had characterized the earlier challenge in the state court. But the "basic issues," the court concluded with one

dissent, had not been presented to the Supreme Court of North Dakota. "We believe that court should have the opportunity of passing on all questions herein." The court, accordingly, abstained from passing upon those issues; it stayed further proceedings before it, but did not dismiss the action. *Lein* v. *Sathre*, 201 F. Supp. 535, 542 (ND 1962).

C. The plaintiffs in the federal case promptly took to the Supreme Court of North Dakota their attack upon the plan adopted by the apportionment group. That court assumed jurisdiction. *State ex rel. Lein* v. *Sathre*, 113 N. W. 2d 679, 681 (1962). It noted that no question arising under the United States Constitution was presented, *id.*, at 681–682, and that it was not concerned with the validity of the allotment of one representative to each senatorial district, as prescribed by the first sentence of § 35 of the Constitution, *id.*, at 683. The court recognized that there was inherent in a constitutional direction to apportion according to population "a limited discretion to make the apportionment that will approach, as nearly as is reasonably possible, a mathematical equality." *Id.*, at 685. It then went on to hold that the apportionment made by the group "violates the constitutional mandate of apportionment according to the population of the several districts and is void," *id.*, at 687, and that the apportionment effected by the 1931 statute continued to be the law until superseded by an apportionment valid under § 35 or under a further amendment of the Constitution. *Id.*, at 687–688.

D. The same plaintiffs then turned again to the federal court. The three-judge court, with one judge dissenting, denied the request for injunctive relief on the ground that the only challenge before it was to the apportionment group's plan, and that the 1931 apportionment was not challenged. *Lein* v. *Sathre*, 205 F. Supp.

536 (ND 1962). It noted that the Legislative Assembly would meet the following January, that it had "the mandatory duty" to apportion the House, and that the court would not presume that it would not perform that duty. Jurisdiction was retained, with the observation that if the Legislative Assembly failed to act, the plaintiffs, upon appropriate amendment of their complaint, might further petition the court for relief. *Id.*, at 540.

E. The 1963 Legislative Assembly did reapportion. Laws 1963, c. 345.

F. *Reynolds* v. *Sims, supra,* and its companion cases were decided in June 1964. A new suit then was instituted in federal court to invalidate North Dakota's entire apportionment system on federal constitutional grounds. Sections 26, 29, and 35 of the Constitution and the 1963 statute were challenged. The three-judge court held that these constitutional and statutory provisions were violative of the Equal Protection Clause. *Paulson* v. *Meier,* 232 F. Supp. 183 (ND 1964). It went on to hold that the 1931 apportionment, being "the last valid apportionment," as described by the North Dakota Supreme Court, and by which the 1963 legislators had been elected, was also invalid. Thus, "there is no constitutionally valid legislative apportionment law in existence in the State of North Dakota at this time." *Id.*, at 187. The court encountered difficulty as to an appropriate remedy. It concluded, one judge dissenting, that adequate time was not available within which to formulate a proper plan for the then forthcoming 1964 elections, *id.*, at 188; that the 1965 Legislative Assembly would have a *de facto* status; and that that Assembly should promptly devise a constitutional system. Injunctive relief was denied. *Id.*, at 190.

G. The 1965 Legislative Assembly produced a reapportionment act although it was not approved or disapproved by the Governor. Laws 1965, c. 338.

H. The North Dakota Secretary of State, defendant in the federal court, then moved to dismiss the federal action on the ground that the 1965 act met constitutional requirements. The three-judge court, however, ruled otherwise. *Paulson* v. *Meier*, 246 F. Supp. 36, 43 (ND 1965). It turned to the question of remedy and concluded that the Legislative Assembly had had its opportunity and that the court now had the duty itself to take affirmative action. *Id.*, at 43–44. It considered several plans that had been introduced in the Assembly and centered its attention on the Smith plan. Although the court found the plan "not perfect" (five multimember senatorial districts [3] and county lines violated in 12 instances), it concluded that the plan, if "slightly" modified, would meet constitutional standards ("impressive mathematical exactness," namely, 25 of 39 districts within 5% of the average population, four slightly over 5%, and only two exceeding 9%). *Id.*, at 44–45. The "slight" modification was made and reapportionment, really the first to be finally effected since 1931, was therefore accomplished in North Dakota by federal court intervention.

I. Still another original proceeding in the State's Supreme Court was instituted. This one challenged the right of senators from the multimember districts to hold office. It was claimed that this multiple membership violated § 29 of the North Dakota Constitution which provided that each senatorial district "shall be represented by one senator and no more." The state court held that the 1965 judgment of the federal court was not res judicata as to the then plaintiffs; that the initial or "freezing" portion of § 29 was clearly invalid; that the

[3] This feature was later described as "a radical departure from state precedent." *Chapman* v. *Meier*, 372 F. Supp. 371, 382 (ND 1974) (dissenting opinion).

concluding portion, restricting representation of a district to one senator, would not have been desired by the people without the "balance" of the freezing portion; and that § 29 as a unit must fall as violative of equal protection. *State ex rel. Stockman* v. *Anderson,* 184 N. W. 2d 53 (ND 1971). The result was that multimember senatorial districts were not held illegal by the state court.

III

The Present Litigation

The 1970 federal census was taken in due course. The 1971 Legislative Assembly failed to reapportion. The present federal action was instituted the following November. The plaintiffs alleged that substantial shifts in population had taken place, and that the court-ordered plan of 1965 no longer complied with the requirements of the Equal Protection Clause. The relief requested was that the court order apportionment upon the 1970 census figures and also provide for single-member districts; that the 1965 plan be declared invalid; and that the Secretary of State be restrained from administering the election laws under that plan.

On May 22, 1972, the three-judge court entered an order to the effect that the existing North Dakota apportionment failed to meet federal constitutional standards and that the court would attempt to reapportion. Jurisdictional Statement A–54. It appointed a commission to formulate and present a plan within 30 days, and it submitted guidelines to the commission. With respect to multimember districts, the order provided:

> "We have considered the matter of 'multi-member' districts and conclude there is insufficient time prior to the 1972 elections to fully explore and resolve the issues involved. The matter of 'multi-member' districts will be studied in depth by the Commission,

> and the results of that study be made available to us." *Id.*, at A–55.

An opinion was filed on June 30. 372 F. Supp. 363. This recited that the Commission had presented eight separate plans to the court; that shifts in population since 1960 had resulted in constitutionally impermissible population variations among existing districts; that a plan submitted by Commissioner Dobson substantially reduced the disproportionate representation, although it decreased the number of districts by one and increased the number of senators by two and the number of representatives by four.[4] "Certain weaknesses" in the plan were recognized, including "some variance in population . . . which, in a few instances, seems substantial," and a continuation of multimember districts. *Id.*, at 366. These districts included the State's five largest cities. The court noted that the districts had been created not by enactment of the Legislative Assembly, but by the federal court in the 1965 *Paulson* decision, and observed, *ibid.*, "In light of subsequent Supreme Court pronouncements, we believe it would be improper for this Court to permit their continuation in a court-fashioned plan." *Connor* v. *Johnson*, 402 U. S. 690 (1971), and *Connor* v. *Williams*, 404 U. S. 549, 551 (1972), were cited. The Court, however, felt

> "constrained to permit multi-member districts to continue during the 1972 elections . . . to avoid extreme disruptions in the elective processes . . . . We feel that the electorate will be better served by minimizing the confusion surrounding the impending elections, than it would be by the abolition of multimember districts at this eleventh hour." 372 F. Supp., at 366.

---

[4] Cf. *Minnesota State Senate* v. *Beens*, 406 U. S. 187 (1972).

The Dobson plan was therefore approved "for the 1972 election only." *Id.*, at 367. An alternative, the Ostenson plan, was commended to the commission for "further study," with a direction to modify it "so as to eliminate the existing multi-member senate districts." *Id.*, at 367–368. Chief District Judge Benson dissented as to the limitation of the Dobson plan to the 1972 election; for him, the *Connor* litigation was distinguishable on racial grounds and the desirability of multimember districts was a question for the Legislative Assembly and not for the court. *Id.*, at 368–369. Jurisdiction was retained.

On November 8, 1972, immediately after the election that year, the three-judge court suspended its June 30 order until further notice and directed the State's Attorney General promptly to report any action taken by the 1973 Legislative Assembly.

That Assembly not only passed an apportionment act but overrode its veto by the Governor.[5] Laws 1973, c. 411, and Note, at p. 1178. The act provided for 37 legislative districts, each having one senator and two representatives, except for five multimember senatorial districts. Section 3 thereof specifically recited the population of each district and the population variance (plus 3.3% to minus 3.5%, a total of 6.8%; or plus 408 persons to minus 432 persons, a total of 840 persons) from the average of 12,355 per senator.

The effectiveness of the legislative plan, however, promptly was suspended by a referendum petition. See Laws 1973, p. 1549. By a companion initiative petition, an amendment to the State's Constitution was proposed; this would have created a commission to reapportion the

[5] The Governor's principal objection, as announced in his veto message, was the failure of the Legislative Assembly to eliminate the multimember senatorial districts. Return to and Compliance with Order, filed March 30, 1973.

State and, in addition, would have mandated single-member senatorial districts. A special election on these took place December 4, 1973. *Both* were defeated. The Legislative Assembly's work to reapportion was thus nullified by the people. It could be suggested, and apparently was, that the people also reacted against the elimination of the five multimember districts. In any event, the defendant thereupon moved the federal court to readopt the plan temporarily approved by its order of June 1972. The plaintiffs resisted.

The three-judge District Court, with Circuit Judge Bright dissenting, then made "permanent" the 1972 Dobson plan, with its five multimember districts providing 18 senators out of a statewide total of 51. 372 F. Supp. 371, 379 (ND 1974). We noted probable jurisdiction. 416 U. S. 966 (1974).

IV

Jurisdiction

We are met at the threshold with a mild question of jurisdiction not pressed by the parties. We have jurisdiction under 28 U. S. C. § 1253 [6] only if a three-judge court was required by 28 U. S. C. § 2281.[7]

---

[6] 28 U. S. C. § 1253:

"Except as otherwise provided by law, any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges."

[7] 28 U. S. C. § 2281:

"An interlocutory or permanent injunction restraining the enforcement, operation or execution of any State statute by restraining the action of any officer of such State in the enforcement or execution of such statute . . . shall not be granted by any district court or judge thereof upon the ground of the unconstitutionality of such statute unless the application thereof is heard and deter-

It might be suggested that the three-judge court here did not restrain the enforcement of a statute but, instead, the enforcement of the court-ordered plan of 1965 which had become unconstitutional in the circumstances of 1972, and, hence, that the provisions of § 2281 were not satisfied. The argument is less than persuasive and we conclude that it is without merit. Although the apportionment now under attack was indeed court-ordered, its enforcement is doubly based on the State's Constitution and statutes. Its effectuation directly depends on the state election law machinery and, in addition, the plan itself is a court-imposed replacement of the North Dakota constitutional provisions and the 1931, 1963, and 1965 reapportionment statutes. It is these that are, and have been, the primary objects of attack. It would be highly anomalous if jurisdiction were not here, for then it would follow that a single judge could invalidate an apportionment plan that had been evolved or approved, and was required so to be, by a three-judge court some time before. Subject matter of this kind is regular grist for the three-judge court, and that route typically has been employed under conditions similar to those present here. See, *e. g., Skolnick* v. *State Electoral Board of Illinois,* 336 F. Supp. 839 (ND Ill. 1971). We think this is correct procedure and we conclude that we have jurisdiction.

V

The Multimember Districts

From the above review of the North Dakota constitutional and statutory provisions and of the litigation of the past 12 years, two significant facts emerge: The first is that some multimembership on the House side of the

---

mined by a district court of three judges under section 2284 of this title."

Legislative Assembly traditionally has existed. This plainly qualifies as established state policy.[8] The second is that, in contrast, multimembership on the Senate side, even as to the five districts, has never existed except as imposed (a) by the three-judge federal court by its 1965 *Paulson* decision; (b) by a majority of the three-judge court as a temporary expedient for the 1972 election only; (c) by the provisions of the 1973 act immediately nullified by referendum; and (d) by a different majority of the three-judge court as a "permanent" solution in the judgment under review. Thus only once has the Legislative Assembly provided for multimember senate representation and that effort was promptly aborted. Every other such provision in North Dakota's history has been court-imposed. Multimember senate representation, therefore, obviously does not qualify as established state policy.

This Court has refrained from holding that multimember districts in apportionment plans adopted by States for their legislatures are *per se* unconstitutional. *White* v. *Regester*, 412 U. S. 755, 765 (1973), and cases cited therein. On the contrary, the Court has upheld numerous state-initiated apportionment schemes utilizing multimember districts. See, *e. g.*, *Kilgarlin* v. *Hill*, 386 U. S. 120 (1967); *Burns* v. *Richardson*, 384 U. S. 73 (1966); *Fortson* v. *Dorsey*, 379 U. S. 433 (1965). And, beginning with *Reynolds* v. *Sims*, *supra*, 377 U. S., at 577, the Court has indicated that a State might devise an apportionment plan for a bicameral legislature with one body composed of at least some multimember districts, as long as substantial equality of population per representative is maintained.

---

[8] Indeed, at oral argument, the appellants did not oppose the allocation of two House members to each senatorial district. Tr. of Oral Arg. 16–17.

Notwithstanding this past acceptance of multimember districting plans, we recognize that there are practical weaknesses inherent in such schemes. First, as the number of legislative seats within the district increases, the difficulty for the voter in making intelligent choices among candidates also increases. See *Lucas* v. *Colorado General Assembly, supra,* 377 U. S., at 731. Ballots tend to become unwieldy, confusing, and too lengthy to allow thoughtful consideration. Second, when candidates are elected at-large, residents of particular areas within the district may feel that they have no representative specially responsible to them. *Ibid.*[9] Third, it is possible that bloc voting by delegates from a multimember district may result in undue representation of residents of these districts relative to voters in single-member districts. This possibility, however, was rejected, absent concrete proof, in *Whitcomb* v. *Chavis,* 403 U. S. 124, 147 (1971). Criticism of multimember districts has been frequent and widespread. *Id.,* at 157–160,[10] and articles

[9] Cf., however, *Fortson* v. *Dorsey,* 379 U. S. 433, 438 (1965), for the suggestion that the at-large representative serves all residents in the subdistricts. Furthermore, while we mentioned these potential weaknesses of multimember districts in *Lucas* v. *Colorado General Assembly,* 377 U. S. 713, 731 n. 21 (1964), we noted that we "do not intimate that apportionment schemes which provide for the at-large election of a number of legislators from a county, or any political subdivision, are constitutionally defective. Rather, we merely point out that there are certain aspects . . . that might well make the adoption of such a scheme undesirable to many voters residing in multi-member counties."

[10] In *Whitcomb* v. *Chavis,* 403 U. S. 124, 158–159 (1971), we acknowledged that

"Criticism [of multimember districts] is rooted in their winner-take-all aspects, their tendency to submerge minorities and to overrepresent the winning party as compared with the party's statewide electoral position, a general preference for legislatures reflecting community interests as closely as possible and disenchantment with

cited therein. See generally Carpeneti, Legislative Apportionment: Multimember Districts and Fair Representation, 120 U. Pa. L. Rev. 666 (1972); Banzhaf, Multi-Member Electoral Districts—Do They Violate the "One Man, One Vote" Principle, 75 Yale L. J. 1309 (1966).

In *Fortson* v. *Dorsey, supra,* we held that the mere assertion of such possible weaknesses in a legislature's multimember districting plan was insufficient to establish a denial of equal protection. Rather, it must be shown that

> "designedly or otherwise, a multi-member constituency apportionment scheme, under the circumstances of a particular case, would operate to minimize or cancel out the voting strength of racial or political elements of the voting population." 379 U. S., at 439.

Further, there must be more evidence than a simple disproportionality between the voting potential and the legislative seats won by a racial or political group. There must be evidence that the group has been denied access to the political process equal to the access of other groups. *White* v. *Regester, supra,* 412 U. S., at 765–766. Such evidence may be more easily developed where the multimember districts comprise a large part of the legislature, where both bodies in a bicameral legislature utilize multimember districts, or where the members' residences are concentrated in one part of the district. *Burns* v. *Richardson, supra,* 384 U. S., at 88.[11] Whether such factors

---

political parties and elections as devices to settle policy differences between contending interests."

Such criticism did not amount to a showing that the use of multimember districts was "inherently invidious" or violative of the Fourteenth Amendment. *Id.,* at 160.

[11] These factors have been criticized as not being particularly helpful. See Carpeneti, Legislative Apportionment: Multimember

are present or not, proof of lessening or cancellation of voting strength must be offered.

This requirement that one challenging a multimember districting plan must prove that the plan minimizes or cancels out the voting power of a racial or political group has been applied in cases involving apportionment schemes adopted by state legislatures. In *Connor* v. *Johnson, supra,* 402 U. S. 690, however, which came to us on an application for a stay, we were presented with a *court-ordered* reapportionment scheme having some multimember districts in both bodies of the state legislature. We stated explicitly that "when district courts are forced to fashion apportionment plans, single-member districts are preferable to large multi-member districts as a general matter." *Id.,* at 692. Exercising our supervisory power, we directed the District Court to devise a single-member districting plan, "absent insurmountable difficulties." *Ibid.* This preference for and emphasis upon single-member districts in court-ordered plans was reaffirmed in *Connor* v. *Williams, supra,* 404 U. S., at 551, and again in *Mahan* v. *Howell,* 410 U. S. 315, 333 (1973). In the latter case a district court was held to have acted within its discretion in forming a multimember district as an interim remedy in order to alleviate substantial underrepresentation of military personnel in an impending election.[12]

Districts and Fair Representation, 120 U. Pa. L. Rev. 666, 694–695 (1972).

[12] In *Mahan* v. *Howell,* 410 U. S. 315, 333 (1973), we stated that the District Court

"was confronted with plausible evidence of substantial malapportionment with respect to military personnel, the mandate of this Court that voting discrimination against military personnel is constitutionally impermissible, *Davis* v. *Mann, supra,* [377 U. S.] at 691–692, and the fear that too much delay would have seriously disrupted the fall 1971 elections. Facing as it did this singular combination of

The standards for evaluating the use of multimember districts thus clearly differ depending on whether a federal court or a state legislature has initiated the use. The practical simultaneity of decision in *Connor* v. *Johnson* and in *Whitcomb* v. *Chavis, supra,* so demonstrates. When the plan is court-ordered, there often is no state policy of multimember districting which might deserve respect or deference. Indeed, if the court is imposing multimember districts upon a State which always has employed single-member districts, there is special reason to follow the *Connor* rule favoring the latter type of districting.

Appellants do not contend that any racial or political group [13] has been discriminated against by the multimember districting ordered by the District Court. They only suggest that the District Court has not followed our mandate in *Connor* v. *Johnson,* and that the court has failed to articulate any reasons for this departure. We agree. Absent particularly pressing features calling for multimember districts, a United States district court should refrain from imposing them upon a State.

The District Court cannot avoid the multimember issue by labelling it, see 372 F. Supp., at 377, a political issue to be resolved by the State. The District Court itself created multimember districting in North Dakota,

---

unique factors, we cannot say that the District Court abused its discretion in fashioning the interim remedy of combining the three districts into one multi-member district."

North Dakota, too, has its military personnel apportionment problem with respect to the bases near Grand Forks and Minot. The appellants recognize the existence of that problem and acknowledge that, conceivably, it could result in some type of multimember districting. Tr. of Oral Arg. 10.

[13] The only minority group of significant size in North Dakota are Indians, and the court-ordered reapportionment plan affects them no differently than any other group.

and it might be said to be disingenuous to suggest that the judicial creation became a political question simply by the passage of nine years. The District Court's treatment of this issue directly conflicts with its prior opinion in this case, where it allowed continuation of the multimember districts first established in the *Paulson* decision in 1965 only as an interim remedy. 372 F. Supp., at 367. The court there noted that in the largest multimember district, a voter would be asked to evaluate the qualifications of at least 30 candidates for the state legislature, a "most formidable" task. *Id.*, at 366. Taking note of *Connor* v. *Johnson*, the court held in 1972 that it would be improper to permit multimember districts to remain permanently, and allowed continued use only for the impending election because of the great confusion that otherwise would result. The court appears now to have abandoned that position, with no suggestion of reasons for the abrupt change. It is especially anomalous that the court would continue with the multimember districting plan, when the Special Master who initially proposed it has disavowed use of permanent multimember districts. Dobson, Reapportionment Problems, 48 N. D. L. Rev. 281, 289 (1972).

In contrast, the dissent in the District Court suggests a wide range of attributes of single-member districts. 372 F. Supp., at 391. One advantage is obvious: confusion engendered by multiple offices will be removed. Other advantages perhaps are more speculative: single-member districts may prevent domination of an entire slate by a narrow majority, may ease direct communication with one's senator, may reduce campaign costs, and may avoid bloc voting. Of course, these are general virtues of single-member districts, and there is no guarantee that any particular feature will be found in a specific plan. Neither the District Court majority nor appellees, how-

ever, have provided us with any suggestion of a legitimate state interest supporting the abandonment of the general preference for single-member districts in court ordered plans which we recognized in *Connor* v. *Johnson*.[14] The fact that no allegation of minority group discrimination is raised by appellants here does not make *Connor* inapplicable.

It is true that in 1973 the voters of North Dakota voted down a proposed constitutional amendment which would have re-established the State's tradition of single-member senatorial districts. At the same time the voters also rejected by referendum the Legislative Assembly's 1973 Act which would have continued the multimember format for five districts. We are unable to infer from these simultaneous actions of the electorate any particular attitude toward multimember districts. It simply appears that North Dakota's voters have not been satisfied with any reapportionment proposal, and that they are frustrated by the years of confusion since the obviously impermissible apportionment provisions of the State's Constitution were invalidated.

We are confident that the District Court, with perhaps the aid of its Special Masters, will be able to reinstitute the use of single-member districts while also attaining the necessary goal of substantial population equality. Special Master Ostenson had indicated that it "would not be terribly difficult to adopt single-member districts." See 372 F. Supp., at 392.[15] Unless the District Court can articulate such a "singular combination of unique factors" as was found to exist in *Mahan* v. *Howell, supra,*

[14] For an example of a conceivable rationale supporting multimember districts, see Carpeneti, cited *supra,* n. 11, at pp. 695–696, where it is suggested that multimember districts may insure that certain interests such as city- or region-wide views are represented.

[15] See also the views of the late Special Master Smith cited at p. 392 of 372 F. Supp.

410 U. S., at 333, or unless the 1975 Legislative Assembly appropriately acts, the court should proceed expeditiously to reinstate single-member senate districts in North Dakota.

VI

The Population Variance

The second aspect of the court-ordered reapportionment plan that is challenged by the appellants is the population divergence in the various senate districts. Since the population of the State under the 1970 census was 617,761, and the number of senators provided for by the court's plan was 51, each senate district would contain 12,112 persons if population equality were achieved. In fact, however, one district under the plan has 13,176 persons, and thus is underrepresented by 8.71%, while another district has 10,728 persons, and is overrepresented by 11.43%. The total variance between the largest and smallest districts consequently is 20.14%, and the ratio of the population of the largest to the smallest is 1.23 to 1.

Reynolds v. *Sims, supra,* established that both houses of a state legislature must be apportioned so that districts are "as nearly of equal population as is practicable." 377 U. S., at 577. While "[m]athematical exactness or precision" is not required, there must be substantial compliance with the goal of population equality. *Ibid. Reynolds* v. *Sims,* of course, involved gross population disparity among districts.

Since *Reynolds,* we have had the opportunity to observe attempts in many state legislative reapportionment plans to achieve the goal of population equality. Although each case must be evaluated on its own facts, and a particular population deviation from the ideal may be permissible in some cases but not in others, *Swann* v. *Adams,* 385 U. S. 440, 445 (1967), certain guidelines have

been developed for determining compliance with the basic goal of one person-one vote. In *Swann* we held that a variance of 25.65% in one house and 33.55% in the other was impermissible absent "a satisfactory explanation grounded on acceptable state policy." *Id.*, at 444. See also *Kilgarlin* v. *Hill, supra,* 386 U. S., at 123–124. In *Swann,* no justification of the divergencies had been attempted. Possible justifications, each requiring adequate proof, were suggested by the Court. Among these were "such state policy considerations as the integrity of political subdivisions, the maintenance of compactness and contiguity in legislative districts or the recognition of natural or historical boundary lines." *Swann, supra,* 385 U. S., at 444. See also *Reynolds* v. *Sims, supra,* 377 U. S., at 578–581.

On the other hand, we have acknowledged that some leeway in the equal population requirement should be afforded States in devising their legislative reapportionment plans. As contrasted with congressional districting, where population equality appears now to be the preeminent, if not the sole, criterion on which to adjudge constitutionality, *Wesberry* v. *Sanders,* 376 U. S. 1 (1964); *Kirkpatrick* v. *Preisler,* 394 U. S. 526 (1969); *Wells* v. *Rockefeller,* 394 U. S. 542 (1969); *White* v. *Weiser,* 412 U. S. 783 (1973), when state legislative districts are at issue we have held that minor population deviations do not establish a prima facie constitutional violation. For example, in *Gaffney* v. *Cummings,* 412 U. S. 735 (1973), we permitted a deviation of 7.83% with no showing of invidious discrimination. In *White* v. *Regester, supra,* a variation of 9.9% was likewise permitted.

The treatment of the reapportionment plan in *Mahan* v. *Howell, supra,* is illustrative of our approach in this area. There the Virginia Legislature had fashioned a

plan providing a total population variance of 16.4% among house districts. This disparity was of sufficient magnitude to require an analysis of the state policies asserted in justification. We found that the deviations from the average were caused by the attempt of the legislature to fulfill the rational state policy of refraining from splitting political subdivisions between house districts, and we accepted the policy as legitimate notwithstanding the fact that subdivision splits were permitted in senatorial districts. Since the population divergences in the Virginia plan were "based on legitimate considerations incident to the effectuation of a rational state policy," *Reynolds* v. *Sims, supra,* 377 U. S., at 579, we held that the plan met constitutional standards.

It is to be observed that this measure of acceptable deviation from population equality has been developed in cases that concerned apportionment plans enacted by state legislatures. In the present North Dakota case, however, the 20% variance is in the plan formulated by the federal court. We believe that a population deviation of that magnitude in a court-ordered plan is constitutionally impermissible in the absence of significant state policies or other acceptable considerations that require adoption of a plan with so great a variance. The burden is on the District Court to elucidate the reasons necessitating any departure from the goal of population equality, and to articulate clearly the relationship between the variance and the state policy furthered.

The basis for the District Court's allowance of the 20% variance is claimed to lie in the absence of "electorally victimized minorities," in the fact that North Dakota is sparsely populated, in the division of the State caused by the Missouri River, and in the goal of observing geographical boundaries and existing political subdivisions. We find none of these factors persuasive here, and none

of them has been explicitly shown to necessiate the substantial population deviation embraced by the plan.

First, a variance of this degree cannot be justified simply because there is no particular racial or political group whose voting power is minimized or cancelled. All citizens are affected when an apportionment plan provides disproportionate voting strength, and citizens in districts that are underrepresented lose something even if they do not belong to a specific minority group.

Second, sparse population is not a legitimate basis for a departure from the goal of equality. A State with a sparse population may face problems different than those faced by one with a concentrated population, but that, without more, does not permit a substantial deviation from the average. Indeed, in a State with a small population, each individual vote may be more important to the result of an election than in a highly populated State. Thus, particular emphasis should be placed on establishing districts with as exact population equality as possible. The District Court's bare statement that North Dakota's sparse population permitted or perhaps caused the 20% deviation is inadequate justification.[16]

Third, the suggestion that the division of the State caused by the Missouri River and the asserted state policy of observing existing geographical and political subdivision boundaries warrant departure from population equality is also not persuasive. It is far from apparent that North Dakota policy currently requires or favors strict adherence to political lines. As the dissenting judge in this case noted, appellee's counsel acknowledged

[16] As early as *Reynolds* v. *Sims*, the Court indicated that suggestions that population deviation was necessary "to insure effective representation for sparsely settled areas and to prevent legislative districts from becoming so large [geographically] that the availability of access of citizens to their representatives is impaired" were unconvincing. 377 U. S., at 580.

that reapportionment proposed by the Legislative Assembly broke county lines, 372 F. Supp., at 393 n. 22, and the District Court indicated as long as a decade ago that the legislature had abandoned the strict policy. *Paulson* v. *Meier, supra,* 246 F. Supp., at 42–43. Furthermore, a plan devised by Special Master Ostenson demonstrates that neither the Missouri River nor the policy of maintaining township lines prevents attaining a significantly lower population variance.[17] We do not imply that the Ostenson plan should be adopted by the District Court, or that its 5.95% population variance necessarily would be permissible in a court-ordered plan. What we intend by our reference to the Ostenson plan is to show that the factors cited by the District Court cannot be viewed as controlling and persuasive when other less statistically offensive plans already devised are feasible.[18] The District Court has provided no rationale for its rejection of the Ostenson plan.

Examination of the asserted justifications of the court-ordered plan thus plainly demonstrates that it fails to meet the standards established for evaluating variances in plans formulated by state legislatures or other state bodies. The plan, hence, would fail even under the criteria enunciated in *Mahan* v. *Howell* and *Swann* v. *Adams.* A court-ordered plan, however, must be held to higher standards than a State's own plan. With a court plan, any deviation from approximate population

[17] See Appendix B to Memorandum Opinion and Order of June 30, 1972, by Judges Bright and Van Sickle (the Ostenson Plan), App. 12–22. The Ostenson plan would allow a total population deviation of only 5.95%.

[18] Another plan appearing to be more acceptable with respect to population variance than that adopted by the District Court is the one suggested by the State's Special Committee on Reapportionment, referred to in Judge Bright's dissenting opinion, 372 F. Supp., at 394 n. 23.

equality must be supported by enunciation of historically significant state policy or unique features. We have felt it necessary in this case to clarify the greater responsibility of the District Court, when devising its own reapportionment plan, because of the severe problems occasioned for the citizens of North Dakota during the several years of redistricting confusion.

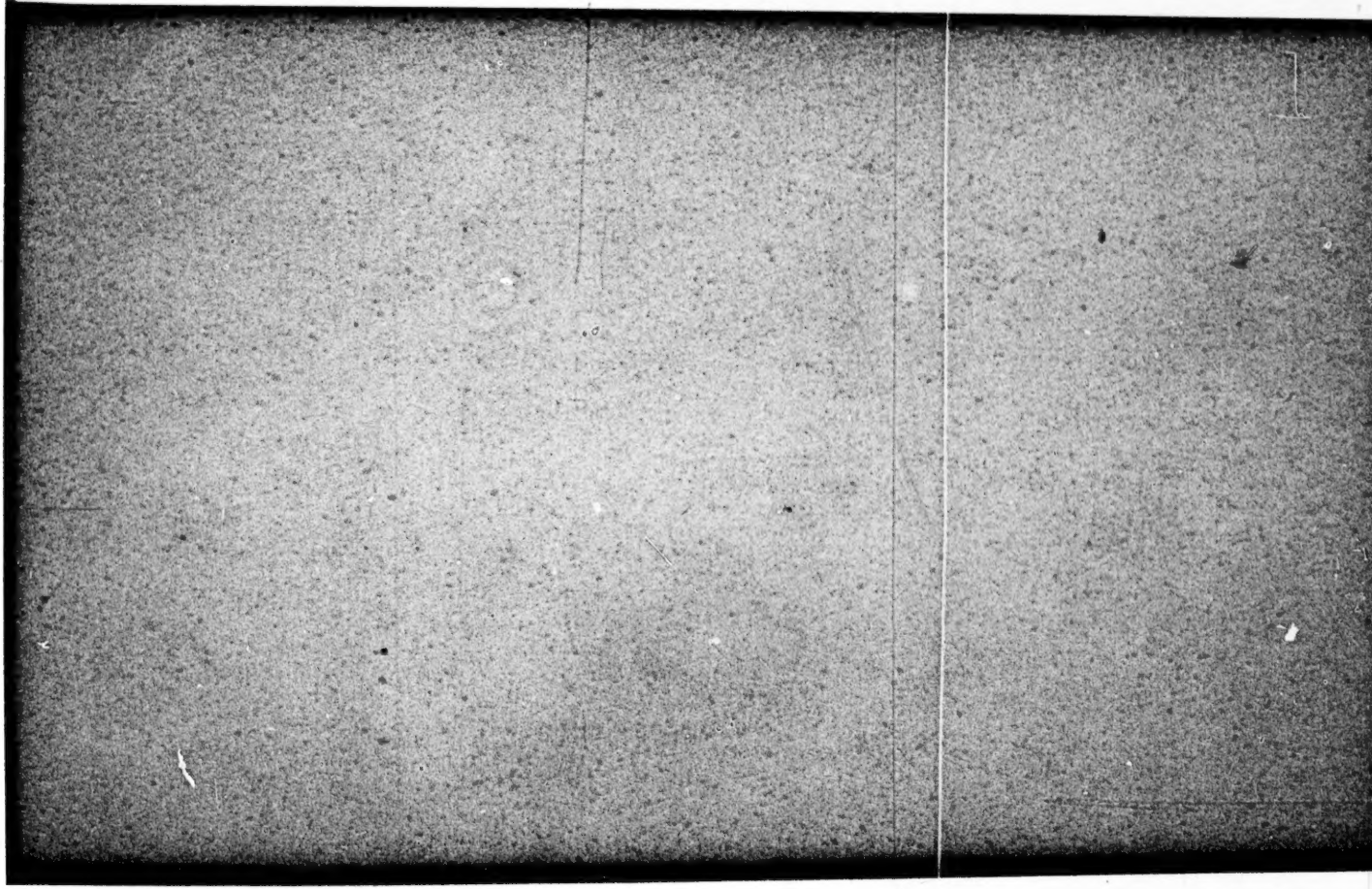
VII

We hold today that unless there are persuasive justifications, a court-ordered reapportionment plan of a state legislature must avoid use of multimember districts, and, as well, must ordinarily achieve the goal of population equality with little more than *de minimis* variation.[19] Where important and significant state considerations rationally mandate departure from these standards, it is the reapportioning court's responsibility to articulate precisely why a plan of single-member districts with minimal population variance cannot be adopted.

We say once again what has been said on many occasions: reapportionment is primarily the duty and responsibility of the State through its legislature or other body, rather than of a federal court. *Reynolds* v. *Sims*, *supra*, 377 U. S., at 586; *Maryland Committee* v. *Tawes*, *supra*, 377 U. S., at 676. Hopefully, the 1975 North Dakota Legislative Assembly will perform that duty and enact a constitutionally acceptable plan. If it fails in that task, the responsibility falls on the District Court and it should proceed with dispatch to resolve this seemingly interminable problem.

---

[19] This is not to say, however, that court-ordered reapportionment of a state legislature must attain the mathematical preciseness required for congressional redistricting under *Wesberry* v. *Sanders*, 376 U. S. 1 (1964); *Kirkpatrick* v. *Preisler*, 394 U. S. 526 (1969); *Wells* v. *Rockefeller*, 394 U. S. 542 (1969); and *White* v. *Weiser*, 412 U. S. 783 (1973).



The judgment of the District Court is reversed and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.